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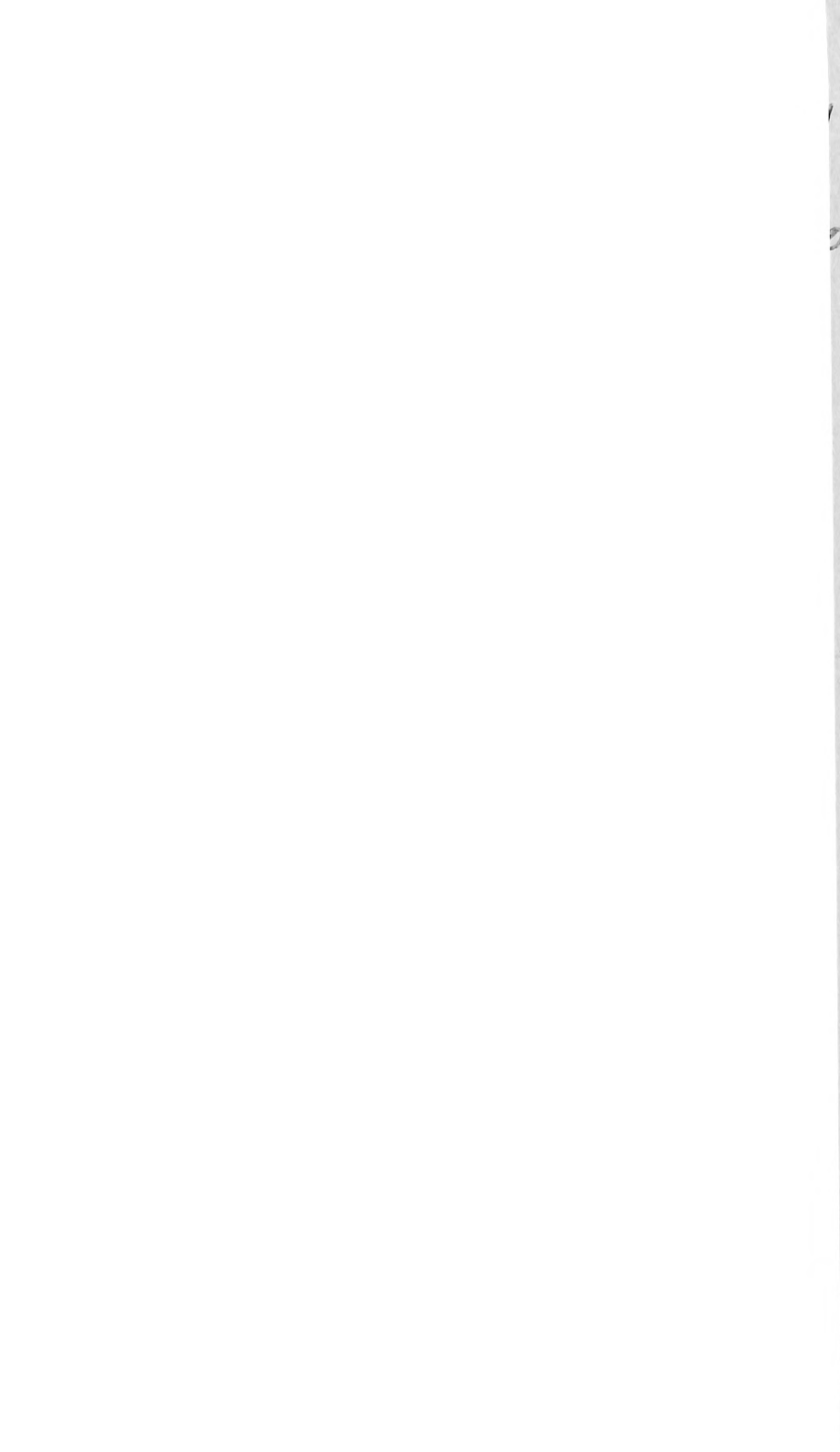
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No. 16117

VOL. 3091

United States *See ALSO 309*

Court of Appeals

for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

SEBASTOPOL APPLE GROWERS UNION,
Respondent.

Transcript of Record

In Three Volumes

VOLUME III.

(Pages 877 to 1315, inclusive)

Petition For Enforcement of An Order of
The National Labor Relations Board

FILED

FEB 12 1959

PAUL P. O'DRIEN, CLERK



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Petition For Enforcement of An Order of
The National Labor Relations Board

JOHN C. AGUIRE

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Trial Examiner: What is your full name?

The Witness: John Clifford Aguire.

Trial Examiner: And your home address?

The Witness: P. O. Box — wait a minute, I changed it now. We had a change in address. It is Eddy Lane, but I forgot— [2105] 411, I believe, Eddy Lane.

Trial Examiner: Sebastopol?

The Witness: Yes, Sebastopol.

Trial Examiner: California.

Direct Examination

Q. (By Mr. Berke): Mr. Aguire, by whom are you employed?

A. By Sebastopol Apple Growers Union. [2106]

* * * * *

Q. Now, when did you become warehouse foreman?

A. That was either in the last part of 1953 or the first part of '54.

Q. Now, do you work on a year round basis or do you work only during the season?

A. Year round basis. [2107]

* * * * *

Q. Did this change over from two shifts to one shift occur before or after the election?

A. It was before election.

Q. Were you notified that there was going to be

(Testimony of John C. Aguire.)

this reduction or change from two shifts to one shift? [2108] A. Yes.

Q. Who notified you? A. Mr. Martini.

Q. And do you know when he notified you with relation to the time when the change-over took place?

A. The day before the layoff took place.

Q. And where were you at the time when you were notified, if you recall?

A. I don't recall. I was probably in the warehouse, though.

Q. Was there anyone else present beside you and Mr. Martini on that occasion?

A. No. I don't believe there was.

Q. Now, what, as near as you recall, did Mr. Martini say to you about that?

A. Well, as I recall he said: "We are going to have to cut down to one shift. The space, we have no space left to put our sauce and we are going to have to cut down to one shift due to that."

Q. Were you, is that all the conversation that you recall?

A. Yes, that is all I recall on that.

Q. Can you keep your voice up so the reporter can get it?

Now, did you participate in a meeting at which the people were selected that were going to be retained? A. Yes.

Q. Where was this meeting held? [2109]

A. It was held upstairs in the cannery.

Q. In whose office was that?

(Testimony of John C. Aguire.)

A. Well, it really wasn't an office. I mean it is in a back room there, back of the lab.

Q. Is this up in the area that is known as the balcony or were there rooms off the balcony in the cannery?

A. Yes.

Q. Who was present at the meeting, as you recall?

A. Well, when I walked in, I believe Leonard Duckworth and Charlie Williams, Ella Herrerias, and I am not sure on anybody else there now myself.

Q. Those are all that you recollect?

A. Yes.

Q. With relation to the layoff, when was this meeting held?

A. I really don't know but I figure around, if I remember right, it must have been a day or two before the, or a day before the layoff, something like that.

Q. Did you stay throughout that meeting?

A. No.

Q. How long were you in that meeting?

A. Around five minutes.

Q. Will you tell us what you did or what you said at that meeting?

A. Well, at the meeting I had my men picked out on a piece of paper and I put it up there on the table and I don't believe [2110] I talked anything up there but I might have said some word casually to somebody just like you greet somebody on the street or some place else.

(Testimony of John C. Aguire.)

Q. Now, this list that you laid on the table, the people that you had picked out, did you pick them out in that meeting or did you pick them out some other place?

A. No. I picked them out in the warehouse.

Q. Before you went up to this meeting?

A. Yes.

Q. And on what basis were those people selected?

A. Well, I picked my men according to merit.

Q. Now, during the period of time that you were present upstairs in the cannery at this meeting, did you hear any discussion about selecting people on the basis of whether they were for or against the union?

A. No.

Q. Did you hear any discussion about selecting people on the basis of whether they were strong for the union or against the union?

A. No, I never.

Q. In selecting the crew that you did for retention on the single shift, did you take into consideration as to whether or not they were members of a union?

A. No.

Q. Now, you testified that Mr. Martini told you that they were [2111] going to go to a single shift because of the space, what was it again, would you mind repeating it, I don't want to repeat for fear I might misstate it.

A. What was that about?

Q. What Mr. Martini told you as to why they were going to the single shift.

(Testimony of John C. Aguire.)

Mr. Karasick: Object. That has been asked and answered.

Mr. Berke: Well, this is preliminary because I want to get into something after that.

Trial Examiner: All right, go ahead.

A. It was due to the warehouse space.

Q. (By Mr. Berke): As the warehouse foreman, were you familiar with the space situation in the warehouse? A. Yes.

Q. At that time in October, 1954, when Mr. Martini talked with you, what was the warehouse situation at SAGU? [2112]

* * * * *

(Question read.)

A. Well, the situation, it was full and we were just, the space we had was what we were shipping out to fill in.

Q. (By Mr. Berke): Did SAGU, in 1954, have an insulated warehouse? A. In '54?

Q. Last year, yes. A. Yes, it did.

Q. How many such insulated warehouses did SAGU have last year?

A. Well, we just have the, the one that is really insulated, and the other one in that building which is dry enough.

Q. Now, when you referred to the other one which is the cement building, which one is that?

A. That is the cannery.

Q. You mean the warehouse section of the cannery? A. Yes, that is right.

(Testimony of John C. Aguire.)

Q. And where is the insulated warehouse located?

A. Insulated warehouse is located where the old, used to be the old packing shed, they made it into a warehouse. It is right next to the cannery.

Q. Out there at Molino Corners?

A. Out at Molino.

Q. Now, was the insulated warehouse full at the time that Mr. Martini talked to you? [2113]

Mr. Karasick: Object to the form of the question. Let the witness testify as to the condition, if any.

Trial Examiner: Put it in the alternative, if you will.

Q. (By Mr. Berke): All right. Was it full or empty? A. It was full.

Q. What was the situation with respect to the warehouse section in the cannery, the cement building that you were talking about at that time?

A. The cannery warehouse was full also.

Mr. Berke: You may cross examine.

Cross Examination [2114]

* * * * *

Q. (By Mr. Karasick): If I understand you correctly then, Mr. Aguire, both No. 1 and No. 2 plants of SAGU were leased last year to Analy?

A. Yes. That is right.

Q. And were used by Analy for the storage of fruit; is that right? A. That is right.

Q. Was it dried fruit in both cases or was some of it canned fruit? A. No, all dried fruit.

(Testimony of John C. Aguire.)

Q. All dried fruit. Those warehouses weren't insulated, were [2117] they?

A. No, they aren't.

Q. And they had been used in years before 1954 by SAGU, one or more of them, for storing canned goods, had they not? A. Yes.

Q. Did they use any of them in 1954 for that purpose? A. No. [2118]

* * * * *

CHARLES ROBERT WILLIAMS

a witness called by on behalf of the Respondents, being first duly sworn, was examined and testified as follows:

* * * * *

Direct Examination

Q. (By Mr. Berke): What is your occupation, Mr. Williams? A. Cannery foreman.

Q. For what company?

A. Sebastopol Apple Growers Union.

Q. Is the Sebastopol Apple Growers Union also known as Sagu or Molino? [2162] A. Yes.

Q. When did you first go to work for that company? A. July 23, 1953.

Q. And what job did you have?

A. Foreman.

Q. Were you foreman of the cannery?

A. Yes.

Q. Were you foreman of the cannery in 1954?

A. Yes.

Q. Were you foreman of the cannery on the day shift or night shift? A. Night shift.

(Testimony of John C. Aguire.)

Q. And where is the insulated warehouse located?

A. Insulated warehouse is located where the old, used to be the old packing shed, they made it into a warehouse. It is right next to the cannery.

Q. Out there at Molino Corners?

A. Out at Molino.

Q. Now, was the insulated warehouse full at the time that Mr. Martini talked to you? [2113]

Mr. Karasick: Object to the form of the question. Let the witness testify as to the condition, if any.

Trial Examiner: Put it in the alternative, if you will.

Q. (By Mr. Berke): All right. Was it full or empty? A. It was full.

Q. What was the situation with respect to the warehouse section in the cannery, the cement building that you were talking about at that time?

A. The cannery warehouse was full also.

Mr. Berke: You may cross examine.

Cross Examination [2114]

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Q. (By Mr. Karasick): If I understand you correctly then, Mr. Aguire, both No. 1 and No. 2 plants of SAGU were leased last year to Analy?

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Q. And were used by Analy for the storage of fruit; is that right? A. That is right.

Q. Was it dried fruit in both cases or was some of it canned fruit? A. No, all dried fruit.

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Q. All dried fruit. Those warehouses weren't insulated, were [2117] they?

A. No, they aren't.

Q. And they had been used in years before 1954 by SAGU, one or more of them, for storing canned goods, had they not? A. Yes.

Q. Did they use any of them in 1954 for that purpose? A. No. [2118]

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Direct Examination

Q. (By Mr. Berke): What is your occupation, Mr. Williams? A. Cannery foreman.

Q. For what company?

A. Sebastopol Apple Growers Union.

Q. Is the Sebastopol Apple Growers Union also known as Sagu or Molino? [2162] A. Yes.

Q. When did you first go to work for that company? A. July 23, 1953.

Q. And what job did you have?

A. Foreman.

Q. Were you foreman of the cannery?

A. Yes.

Q. Were you foreman of the cannery in 1954?

A. Yes.

Q. Were you foreman of the cannery on the day shift or night shift? A. Night shift.

(Testimony of Charles Robert Williams.)

Q. Did you remain foreman of the night shift in 1954 throughout the season?

A. As long as the night shift ran, yes.

Q. Then what happened after the night shift?

A. I was put on as day foreman. [2163]

* * * * *

Q. Do you recall the change-over from the two shifts to one shift in October of last year?

A. Yes, I do.

Q. Do you recall a meeting of employees held on October 15 in the warehouse of Sagu? A. Yes.

Q. As foreman of the cannery, did you participate in the selection of the employees who were to be retained for that single shift? A. Yes, I did.

Q. And who participated with you, if anyone, in the selection of such employees?

A. Leonard Duckworth and Ella Herrerias.

Q. And was there a meeting between the three of you or were there others present?

A. There were others present.

Q. Do you recall who?

A. Well, we were the main three that were there all the time. There was young Danny, John Aguire and Danny Shuster; and Bill brought up the list.

Q. Bill who?

A. Bill McGuire, of the day shift and the night shift people that were working there. Esther Doty and Mary McGuire were in and out a time or two.

Q. Did Mr. Aguire participate throughout the meeting with you? A. No, he didn't.

Q. About how long was he there, do you recall?

(Testimony of Charles Robert Williams.)

A. Possibly five minutes.

Q. And did Mr. McGuire participate in the meeting?

A. No; he came up with the men he was going to keep for the warehouse, and that was all.

* * * * *

Q. Where did this meeting take place? [2165]

A. A little room back of the lab. We used it last year as a dining room and also a little storage in there.

* * * * *

Q. With relation to the meeting in the warehouse on October 15, when did this meeting between people you mentioned and yourself take place?

A. Oh, I don't know; about a day or two before the layoff. [2166]

* * * * *

Q. Will you tell us what was said and what was done in that particular meeting, Mr. Williams, as near as you can recollect. if you are going to quote somebody, will you please identify the person that is speaking?

A. You mean what happened when we selected the people?

Q. Yes.

A. Well, Bill McGuire brought up the list of employees the day and the night shift, and we went over the names and we picked——

Q. Who is "we"?

A. Leonard Duckworth, myself and Ella.

(Testimony of Charles Robert Williams.)

Q. Herrerias?

A. Yes; and we discussed each one as to how good workers they were, and picked out the crew that we wanted to keep.

Q. Is there anything more that was said at that meeting, or anything more that was done?

A. No.

Q. Was there anything said at that meeting by anyone in [2167] discussing individuals as to whether that particular individual was for or against the Teamsters union?

A. No, there wasn't.

Q. Was there anything said in that meeting about whether any particular individual was strong for or against the union? A. No, sir.

Q. Was there anything said in that meeting about whether this person was an agitator or trouble maker? A. No. [2168]

* * * * *

Q. You say you recall the meeting of October 15 of the employees that was held in the warehouse; is that correct?

A. Will you please ask that again?

(Question read.)

A. Yes.

Q. Did you attend that meeting?

A. I attended it but I wasn't inside. I was standing by the door. I didn't hear all that went on.

Q. You didn't what?

A. Hear everything that was said.

Q. Following that meeting, did all of the em-

(Testimony of Charles Robert Williams.)

ployees working [2169] on the night shift go back to their jobs that evening or that afternoon?

Mr. Karasick: I object, unless the proper foundation for the basis of this witness' knowledge is first established.

Trial Examiner: I will permit him to answer, if he knows.

The Witness: No, they didn't.

Q. (By Mr. Berke): Do you know approximately how many did not return to their jobs that afternoon?

Mr. Karasick: Object on the same basis.

Trial Examiner: Overruled.

The Witness: I would say 15 or 20. [2170]

* * * * *

Q. (By Mr. Berke): My question was, was production increased or decreased as a result of the absence of these employees.

A. It was decreased.

Q. Do you remember an employee by the name of Gloria Pate? A. Yes, I do.

Q. Do you recall an incident involving Gloria Pate on the first day of the single shift?

A. Yes, I do.

Q. About what time of the day was it this occurred, as near as you can recall? [2171]

A. Shortly after 8:00 o'clock.

Q. 8:00 o'clock in the morning or evening?

A. In the morning.

* * * * *

Q. (By Mr. Berke): Where did the incident

(Testimony of Charles Robert Williams.)

take place? A. It took place in the cannery.

Q. And how did it come to your attention?

A. Well, Ella Herrerias brought it to my attention, the floor lady.

Q. At the time she brought it to your attention, who was present besides you and Ella Herrerias, in the immediate presence of the two of you?

A. There wasn't anyone.

Q. Will you tell us what was said and please identify who is speaking?

Mr. Magor: Is this a conversation between Ella and this gentleman?

Mr. Berke: That is right.

Mr. Magor: I object to it on the ground it is self-serving, [2172] outside the presence of Miss Pate.

Trial Examiner: Overruled.

The Witness: Well, she told me that Gloria Pate was working and she wasn't on the list to be working, so I went over and told her she wasn't—

Q. (By Mr. Berke): Wait a minute. Is this all the conversation between you and Ella?

A. Yes.

Q. Then what did you do following that?

A. I went to Gloria Pate and told her she wasn't to be working.

Q. Where was Gloria Pate at the time you went to her? A. On the inspection belt.

Q. And who was present besides you and Gloria Pate in the immediate conversation?

(Testimony of Charles Robert Williams.)

A. Nobody was present in the immediate conversation.

Q. Will you tell us what was said and who said it?

A. I told her that she wasn't to be working. She said that she had a time card that she punched in. I looked for a time card and couldn't find any.

Q. Is this all the conversation there was?

A. That is all at the time, yes.

Q. What did you do? You started to say something and I interrupted you.

A. After I looked for a time card and couldn't find it, I went up to the office to see if her name was on the list to be [2173] retained and I couldn't find it there either.

Q. Find the list? A. Yes.

Q. Did you look at it? A. Yes.

Q. Was her name on it? A. No.

Q. What did you do after you searched for the card and looked at the list?

A. Went back to Gloria Pate.

Q. Where was she at that time?

A. Same position.

Q. Who was present on that occasion besides you and Gloria Pate, if anyone else?

A. There were a couple other women on the line there but I don't recall their names.

Q. Did they hear the conversation? A. Yes.

Mr. Magor: Object to it on the ground it asks for the opinion and conclusion of the witness.

Q. (By Mr. Berke): To your knowledge.

(Testimony of Charles Robert Williams.)

take place? A. It took place in the cannery.

Q. And how did it come to your attention?

A. Well, Ella Herrerias brought it to my attention, the floor lady.

Q. At the time she brought it to your attention, who was present besides you and Ella Herrerias, in the immediate presence of the two of you?

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Trial Examiner: Overruled.

The Witness: Well, she told me that Gloria Pate was working and she wasn't on the list to be working, so I went over and told her she wasn't——

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A. Yes.

Q. Then what did you do following that?

A. I went to Gloria Pate and told her she wasn't to be working.

Q. Where was Gloria Pate at the time you went to her? A. On the inspection belt.

Q. And who was present besides you and Gloria Pate in the immediate conversation?

(Testimony of Charles Robert Williams.)

A. Nobody was present in the immediate conversation.

Q. Will you tell us what was said and who said it?

A. I told her that she wasn't to be working. She said that she had a time card that she punched in. I looked for a time card and couldn't find any.

Q. Is this all the conversation there was?

A. That is all at the time, yes.

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Q. Find the list? A. Yes.

Q. Did you look at it? A. Yes.

Q. Was her name on it? A. No.

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Q. Where was she at that time?

A. Same position.

Q. Who was present on that occasion besides you and Gloria Pate, if anyone else?

A. There were a couple other women on the line there but I don't recall their names.

Q. Did they hear the conversation? A. Yes.

Mr. Magor: Object to it on the ground it asks for the opinion and conclusion of the witness.

Q. (By Mr. Berke): To your knowledge.

(Testimony of Charles Robert Williams.)

Trial Examiner: Were they in hearing distance?

The Witness: Yes.

Q. (By Mr. Berke): Did they participate in the conversation? A. No. [2174]

Q. What was the conversation between you and Gloria Pate at that time?

A. I told her she wasn't supposed to be working, so she said she had a card and punched in. I said she would have to leave. She said something about, "You have to pay me for a couple of hours," and I told her she would have to take that up with the management.

Q. Was that all?

A. That is all the conversation I had with her.

Q. Did she continue working after that?

A. No, she didn't.

Q. Mr. Williams, Mrs. Orice Storey testified here that on August 4, that you and Leonard Duckworth approached the car which she was sitting in with her husband and Mr. Duckworth gave her two union authorization cards. On that occasion you said, "Do us a good turn and run over that man."

Did you say any such thing to either Mrs. or Mr. Storey? A. No, I did not.

Q. Did you say any such thing at any time?

A. No.

Q. Did you ever go over to Mr. and Mrs. Storey's car? A. No, I didn't.

Q. In the entire season of 1954? A. No, sir.

Q. Did you ever see Leonard Duckworth give Orice Storey a [2175] union authorization card?

(Testimony of Charles Robert Williams.)

A. No, I did not.

Q. Mr. Storey testified that on that same occasion you said, "Do your country a good deed and run over that guy," pointing to somebody who was walking out towards the highway.

Did you make any such statement?

A. No, I didn't.

Q. To Mr. Storey or anyone else at any time?

A. No, sir.

Mr. Berke: You may cross-examine.

Cross Examination * * * * *

Q. (By Mr. Karasick): I believe you said that shortly before the layoff on October 15, Duckworth had told you that they were going to have to knock off the night shift and to pick out one crew, is that right, have one crew work? A. Yes.

Q. Did he tell you the reason for that?

A. We talked about it a little, yes.

Q. What reason did he tell you they would have to do that?

A. Shortage of storage space is the main reason.

Q. Any other reasons that he gave you?

A. No.

Q. Any other reasons you ever heard?

A. No. [2198]

* * * * *

Q. You remember you were asked about the conversation between you and Orice Storey on August 4 of last year? Mr. Berke asked you about that?

A. Yes.

(Testimony of Charles Robert Williams.)

Q. I would like to know whether you deny that conversation took place, or you can't recall whether it took place? A. I deny it.

Q. You deny it? A. Yes, I do.

Q. Your testimony is that that conversation never occurred? A. That is right.

Q. I take it that if I asked you the same question with respect to the conversation or the statements between you and Clarence Storey on that day and at that time your answer would be the same? A. It would. [2207]

* * * * *

Redirect Examination

Q. (By Mr. Berke): Mr. Williams, with respect to the night shift employees on October 15, tell us whether or not those employees had been notified that they were to work the night shift. [2217]

A. Yes; they had been notified.

* * * * *

Q. (By Mr. Berke): When were they notified?

Mr. Karasick: Object on the same ground.

Trial Examiner: You may have a continuing objection. Go ahead.

The Witness: They were notified before the meeting took place over in the warehouse.

Trial Examiner: Before?

The Witness: Yes.

Q. (By Mr. Berke): Was it the same day or the day before? A. Same day.

Q. How were they notified?

(Testimony of Charles Robert Williams.)

A. I told them, and also the floor lady.

Q. Where did you tell them?

A. In the cannery. [2218]

* * * * *

MAX HERRERIAS

a witness called by and on behalf of the Respondent,
and being first duly sworn, was examined and testi-
fied as follows: [2247]

* * * * *

Direct Examination * * * * *

Q. (By Mr. Berke): Is Ella P. Herrerias your
wife? A. Yes. [2248]

* * * * *

Q. Did you ever see this list that they discussed
on that occasion? A. Yes, sir.

Q. When did you see it? [2257]

A. A few minutes after this lady brought this
list.

Q. Do you remember when it was she brought
it?

A. It was either on a Saturday or a Sunday.

Q. Do you know about what date, or can you
fix it?

A. No. The only thing I remember was that it
was after the layoff because my wife had already
gone into the day shift.

Q. Where did you see it?

A. When my wife handed it to me.

Q. Where did she hand it to you, where were
you? A. In the kitchen.

(Testimony of Max Herrerias.)

A. No, I don't recall it.

Q. Would it refresh your recollection if you were told the name? A. Yes.

Q. Is it Irma Bate? A. Correct.

Q. Did your wife discuss that list with you?

A. Yes.

Q. Did she discuss it with you?

A. Right away. [2260]

Q. Was anyone else present? A. No, sir.

Q. What did she say to you about it?

A. She said——

Mr. Karasick: Just a moment. I am sorry to interrupt, but I am going to object to this on the ground that it is self-serving and is outside the presence of the government in this case, or the Charging Party.

Trial Examiner: I don't believe that the rule of criminal law would apply here. I will allow the testimony.

The Witness: She said, "What do you think of this?" I said, "That list has been planted on you." That was my first words I said to her.

Mr. Karasick: May I have that?

(Answer read.)

The Witness: She said, "What do you mean by that?" I said, "Ella, that list, you have no use for that list. There is something wrong with this list. Why should they bring it to you?" I said, "Personally, I would take it to the officials of the plant or the company and tell them that this is what has been handed to you and what should you do."

(Testimony of Max Herrerias.)

Q. (By Mr. Berke): And what did Mrs. Herrerias say?

A. Mrs. Herrerias said, "I think I will." [2261]
* * * * *

ELMO MARTINI

a witness called by and on behalf of the Respondent, having previously been duly sworn, was examined and testified further as follows: [2308]

Direct Examination

* * * * *

Q. (By Mr. Berke): Let me ask you where your ranch is located.

A. My ranch is located approximately seven miles north of Sebastopol.

Q. Were you familiar with the apple crop condition as it relates to the apples that were delivered to SAGU in 1954? A. Yes.

* * * * *

Trial Examiner: I will direct the witness to testify only as to what he saw himself and I will permit the answer.

The Witness: During the 1954 season, there was a considerable amount, an excessive amount, I should say, of bitter pit on the trees, something that we usually don't have showing at that particular time of the season. However, the crop was harvested and we thought at that time maybe the bitter pit would disappear along with bitter pit we had another fungus [2312] disease that we call the "smut" that was very prevalent, and during the

(Testimony of Elmo Martini.)

harvest, the bitter pit showed up along with a few other blemishes on the apple that from our packing shed about 50 per cent of our apples became culls, which is a very excessive amount of culls to be gotten from a fresh fruit house.

* * * * *

Q. (By Mr. Berke): Mr. Martini, was there during the season of 1954 any spoilage in the apple crop that was delivered to SAGU?

A. Yes, sir, there was.

Q. In terms of tons, how many tons of the apples that were delivered to SAGU last season were spoiled? [2313]

* * * * *

The Witness: We estimate in our office that approximately 700 tons were disposed of as spoiled apples.

Q. (By Mr. Berke): When you say they were disposed of as spoiled apples, will you tell us what you mean by that? What was done with them?

A. They were taken off of the dump belts, put into boxes, dumped on a dump truck that we have there and then dumped either into public dumps or in certain instances we had dug a trench and dumped them into a trench and buried them.

Q. Were you, in your capacity as a member of the board of directors and as secretary, familiar with the amount of spoilage in the 1953 season?

Mr. Karasick: Object on the same basis.

Trial Examiner: Overruled.

Q. (By Mr. Berke): Just answer yes or no.

(Testimony of Elmo Martini.)

A. Yes.

Q. In terms of tons, how many tons of apples delivered to SAGU in the 1953 season spoiled?

A. We estimate that probably 25 to 50 tons.

Q. Mr. Martini, do you know how many tons of apples all told were delivered to SAGU during the 1954 season?

A. Yes.

Q. Will you please tell us? [2314]

* * * * *

A. In 1954 we received into SAGU somewhere around 16,500 tons.

Q. Of that tonnage, do you know how many tons were shipped as fresh apples?

A. I would say about 4,650 tons were shipped as fresh apples.

Q. Do you know what happened to the difference between that 16,500 and 4,600 tons that you referred to?

A. Yes.

Q. Will you please tell us?

A. Our own cannery used up about 8,700 tons of them. We processed for our own account approximately 14 to 15 hundred tons at another cannery. There were approximately 1,000 tons of them that went to other processors, such as, oh, let us say, S&W. [2317]

* * * * *

Q. (By Mr. Berke): Did you in 1954?

A. Yes, sir.

Q. When you say you took care of all fresh fruit sales in 1954, will you please explain what you mean by that?

(Testimony of Elmo Martini.)

A. Well, in my out of state shipments I turned that particular portion of the sale business over to a selling organization in the name of Heggblade and Margulis, which have their office in the Matson Building in San Francisco. They take care of all out of state shipments.

The state business, the California business, I take care of from my office through brokers and distributing houses that I deal directly with from my office at SAGU.

Q. Was that the situation in 1954?

A. Yes, sir.

Q. Tell us whether or not you kept in touch with the fresh apple market conditions during the 1954 season?

Mr. Karasick: Object to the characterization and conclusion, "kept in touch," and ask the witness be asked to testify what he did with respect to this matter.

Q. (By Mr. Berke): Yes or no? A. Yes.

Trial Examiner: I will permit it. I assume "by keeping in touch," you mean watching the figures.

Mr. Berke: I will go into that.

Q. (By Mr. Berke): What did you do in that respect, will you describe that? [2321]

A. I would talk daily, several times a day, for instance, to the Heggblade Company.

Q. How would you talk to them?

A. By telephone, and also by teletype. We would review the various markets over the United States to see what they were doing, what the particular

(Testimony of Elmo Martini.)

market was receiving from other shippers, then in the Los Angeles market, I would call a broker whom I had in my employ, a Mr. Bill Hooker, and clear with him once and twice and three times daily to see how that market was going, how many apples we had on the various floors of the street.

Q. What do you mean by "street"?

A. We refer to the markets in fresh fruit as the "street." In other words, Los Angeles has Seventh and Ninth Streets, that are produce markets. In San Diego I would clear with a broker whom I had there, a Mr. Williams, and I would talk to him once at least daily, and sometimes twice, depending upon the occasion. Then I had another market that is quite important to us in Sacramento. There it was handled for me by a Mr. Jack Downey, and I cleared with him on that particular condition on that market.

Q. You have used the term in referring to what you have done with these various people or organizations at different points as "clear with them." What do you mean by that? [2322]

A. What I mean, possibly I shouldn't have used the word "clear." I would discuss the market conditions with them and sometimes we would decide not to ship any apples into a market if the price was too low, or we would decide to ship twice as many as we would if the apples were available, and often we would maybe not ship as many out of state as we normally would due to the condition of a good market here in the State of California.

(Testimony of Elmo Martini.)

or vice versa. Many things will happen in the market.

Q. Tell us whether or not price was discussed with these various representatives or organizations?

A. Mostly price.

Q. Going back to the question that I asked as to why all of the fruit, or the difference between the 4600 tons that was shipped fresh and the 16,000 tons received at SAGU in 1954 were not shipped fresh, will you please explain?

A. There were various reasons for them. Chiefly the main reason for not shipping was the price at the particular time that we had apples to ship. If the price in the markets was not good, you just don't ship apples. We had times there where no price would have moved apples, Mr. Berke. The markets did not want them. They had too many apples shipped in there and they wouldn't take any apples or they would take them on a consignment deal, and you were at the mercy of the four winds then to see whether or not you were going to get the packing cost back. [2323]

* * * * *

Q. You have testified that some of the apples were shipped to other processors. Were any shipped to the Sebastopol Co-op Cannery in 1954?

A. Yes.

Q. Do you know when you first shipped apples to them for processing? [2324]

* * * * *

The Witness: We shipped the Sebastopol Co-op

(Testimony of Elmo Martini.)

Cannery the first apples from SAGU on July 23, and shipped daily through July 29.

Q. (By Mr. Berke): What was the purpose in shipping those apples at that time to the Sebastopol Co-op Cannery?

Mr. Karasick: I object again unless the proper foundation is laid.

Trial Examiner: Overruled.

Mr. Karasick: We don't know this termination was made by this witness.

Mr. Berke: You can get it on cross.

Trial Examiner: Overruled.

The Witness: During that period we had entered a program of slicing Gravenstein apples. Therefore, our plant was equipped to slice only. During that time, along the 23rd or 22nd of July, I took an order from one of the major retailers, that included among it 15,000 cases of 8 ounce apple sauce.

Q. (By Mr. Berke): Who was the dealer?

A. That was Regent Canned Foods, a subsidiary or buying agent for Safeway Stores. Our plant was not equipped for the production of 8 ounces. Therefore, I went to Mr. Farmer and asked him if he wouldn't produce it for me and he said since I am not on producing for myself, we would be happy to produce the 8 ounces for us.

Q. Who is Mr. Farmer?

A. A former manager of the Sebastopol Co-op Cannery.

(Testimony of Elmo Martini.)

Q. And at that time did SAGU produce both slices and apple sauce? A. No, sir.

Q. And you say you were not equipped to produce 8 ounce apple sauce. What do you mean by that?

A. We didn't have filling equipment nor sealing equipment for filling 8 ounce. It takes a special equipped machine to go to that small size.

Q. And did the Sebastopol Co-op have such equipment at that time? A. Yes, sir.

Q. How many cases were filled for you or packed for you during that period in July that you have mentioned by the Sebastopol Co-op Cannery? A. Approximately 15,000 cases.

Q. After that did you ship any apples for processing to the Sebastopol Co-op Cannery? [2326]

A. Yes.

Q. And when did you next do that, Mr. Martini?

A. We next shipped them apples somewhere around the 13th or 14th of August.

Q. August, 1954? A. Yes.

Q. And for how long did you continue shipping them apples during that month?

A. I would say approximately one month.

Q. From when to when, as near as you can tell?

A. I may have my dates mixed up on that. I don't believe we shipped them any apples in August. I must reverse my statement there. I don't believe it was until September that we shipped them apples again.

Q. From September to when?

(Testimony of Elmo Martini.)

A. I believe we started on the 13th of September and ran through to about the 10th of October.

Q. And will you tell us the reason for sending apples during that period to the Sebastopol Co-op Cannery?

Mr. Karasick: Again the same objection, Mr. Examiner.

Trial Examiner: Overruled.

The Witness: The way the season worked out, looking back at it, I should have sent them sooner, but there were several reasons for that. One was that the Co-op Cannery could not handle them and at that time I thought I could handle the apples myself. [2327]

Q. (By Mr. Berke): When was this?

A. That was along the early part of September. Then in watching the apples, we found that the apples would not hold up. The entire apples would rot in the box, and every day our tonnage of spoils would mount up, and if we had waited any length of time on that, I doubt very much whether any apples could have been canned because I could not have got to the apples that were in question until possibly October 10th to 15th, somewhere along in there.

Q. Do you know how many tons of apples were sent over to Sebastopol Co-op during that period?

A. During the second period?

Q. Yes.

A. During the second period it is my recollection that about 1350 tons were sent over.

(Testimony of Elmo Martini.)

Q. And that tonnage was processed into what, Mr. Martini?

A. It was processed into 303 apple sauce.

Q. Were you familiar with the equipment that SAGU had in its cannery in 1953? A. Yes.

Q. Was that equipment the same or was it **not** the same in 1954?

A. It was the same in 1953 as it was in 1954.

Q. Do you know what tonnage of apples was received by SAGU during the 1953 season? [2328]

Mr. Karasick: Object for the same reason as previously stated.

Trial Examiner: Overruled.

The Witness: Yes.

Q. (By Mr. Berke): Will you state it, please?

A. 12,500 tons.

Q. And of that tonnage, what amount was shipped fresh? A. Approximately 4500 tons.

Q. I believe you testified as to the amount of spoilage that year, did you not? A. Yes.

Q. What was that amount?

A. 25 to 50 tons.

Q. Do you know what happened to the difference between the approximately 4500 tons that were shipped fresh on the 12,500 tons that you received that year?

A. I know that we processed at the cannery approximately 6500 tons, that we dried 900 tons. We shipped to other processors approximately 5 to 6 hundred tons, and probably shipped to Co-op Cannery 200 tons, or something like that. [2329]

* * * * *

(Testimony of Elmo Martini.)

Q. (By Mr. Berke): Mr. Martini, in 1954 did SAGU have any warehouses? A. Yes.

Q. How many warehouses did it have altogether?

A. We had four.

Q. Will you tell us where they are located and if they are listed by number in SAGU's operation, will you please identify them?

A. Well, we have No. 1, that is located on McKinley Street in the city of Sebastopol.

Q. Go ahead.

A. No. 2 is on High Street in the city of Sebastopol. We have the SAGU station plant at SAGU station about a mile north of the town of Grayton, and then we have the warehouse at Molino.

Q. What is that number?

A. That is No. 5, I believe.

Q. Does the SAGU station have a number?

A. 6. [2342]

Q. What sort of a warehouse was No. 1, the one on McKinley Street, last year?

A. What was it used for?

Q. Well, describe it first physically. What sort of a structure was it?

A. It is a wood frame building; the outside walls are lath and brick with a truck level floor and a composition roof.

Q. And what was No. 2 like?

A. No. 2 is exactly the same, the only difference being the roof, which is a galvanized roof.

Q. And No. 5 at Molino, what is that?

A. No. 5 at Molino was originally the same type

(Testimony of Elmo Martini.)

of structure that we have rebuilt, taking the truck back off of it and dropping the floor to floor level or to ground level, we will say. The walls, instead of lath and boards, we covered that over with aluminum and put a galvanized roof over the present roof and insulated the inside of it. That is, we put a ceiling and an inside wall on the inside of the building.

Q. Will you describe No. 6?

A. No. 6 is the same type of building as No. 1, just a galvanized roof and the floor is at truck level. There is no ceiling or inner wall to it at all. It is just a shed. We call them sheds.

Trial Examiner: What was that floor level?

The Witness: Truck level. The floor is at truck level.

Q. (By Mr. Berke): When you say the floor is at truck level, what do you mean by that?

A. When a truck backs up to the warehouse, the body of the truck and the level of the floor are the same height.

Q. You referred to No. 5 as having been insulated. Were the others insulated last year?

A. No, sir.

Q. What was No. 1 used for last year?

A. During the early part of the year—that is, from January until about the 15th of August, we used it as an empty box storage warehouse, empty field boxes.

Q. That is the one on McKinley Street?

A. Yes. We repaired boxes during the off-season,

(Testimony of Elmo Martini.)

and then stored them there for growers when it came time that they needed boxes for harvest.

Q. And was it used for that purpose all through 1954?

A. No. The plant was emptied about, I would say, along about the middle of August, emptied of all the empty boxes.

Q. And then what was it used for after that?

A. Then there were a few dried apples put in from the Anlay Marketing Group.

Q. What was No. 2 used for?

A. No. 2 is leased to the Anlay Marketing Co-op.

Q. And what was stored there? [2344]

A. Dried apples.

Q. Is that the one that was recently burned down?

A. No; that was No. 1.

Q. What was No. 5 used for last year?

A. No. 5 was an operating plant and it was used for the packing of apples.

Q. That is the one at Molino, the insulated warehouse?

A. No.

Q. Did I make a mistake? I thought you said No. 5 was the one——

A. I am not too sure about the numbers of those two plants. I am not sure which one we refer to as 6. We always refer to them usually as Molino and SAGU Station.

Q. So we are clear, I am talking about the one at Molino?

A. There at Molino we use it in the cannery warehouse.

(Testimony of Elmo Martini.)

Q. And when you said No. 5 was insulated, which one were you referring to?

A. The one at Molino.

Q. The one at SAGU Station, what was that used for last year?

A. We used that for packing apples. There is always an inventory of shook, which is knocked down boxes that will go through the machines to be made up as Northwest boxes. We store some cartons in there, but primarily it is used for a packing operation. [2345]

Q. Do you have any cold storage facilities—rather, did you have any cold storage facilities last year? A. Yes.

Q. Where were those located?

A. They were located at the Molino plant.

Q. And what are those called? Are those warehouses? A. Cold storage warehouses.

Q. How many of those did you have in Molino?

A. We refer to that as one, with two rooms. There are two rooms, each one 100x100.

Q. Are the two rooms under one roof?

A. Yes, sir.

Q. And what was stored in the cold storage warehouse last year?

A. For the major portion of the year, that is from July until the first of the year, I would say that they were fresh apples.

* * * * *

Q. (By Mr. Berke): Do you remember a Board of Directors meeting at SAGU that was held on

(Testimony of Elmo Martini.)

October 12 last year? A. Yes, sir.

Q. Were you present at that meeting?

A. Yes, I was.

Q. Will you tell us as near as you recall who else was [2346] present at that meeting?

A. Well, there was Bill McGuire and Mr. Bondi, Mr. Guerrazzi, Mr. Winkler, Mr. Cordoza, Mr. Roberts, Mr. Hankins and Mr. Miller.

Q. Those are all that you recall? A. Yes.

Q. Was there any discussion at that meeting about your warehouse situation?

A. Yes, there was.

Q. Will you please tell us what that discussion was and tell us what was said and who said it.

A. As General Manager, I told the Board that we had just about filled up all our available cannery storage at the Molino plant, and from a recent survey that we had taken, we had about harvested our entire crop from the grower level to the packing sheds. I told them that we couldn't operate at the volume that we were going, keeping up with the shipments, of course, and still have our canned goods put under roof, that is, in suitable warehouses.

Trial Examiner: Read that last part.

(Answer read.)

Q. (By Mr. Berke): Go ahead with the rest of the conversation.

A. Then there was a general discussion had, and the Board finally authorized me to—we talked about the possibility of running one shift to see whether

(Testimony of Elmo Martini.)

or not we could handle the [2347] production from one shift, and at that one I know I was quite sure that we could because our shipments at that time were just about equal to what a single shift would produce.

At that point the Board instructed me to cut to one shift as soon as possible.

Q. Is that all?

A. That is all that transpired, yes.

Q. You say that you mentioned something about keeping up with shipments and your available cannery space. What do you mean by that? Could you clarify that for us?

A. During the day, along that time of the year, our shipments could amount to up to 4,000 cases per day. Our production from one shift last year varied from anywhere from 1,700 cases per shift up to as high as, of course, 3,000 cases a shift, depending upon the fruit that was being handled.

So in view of the shipments that we were normally making, the production from one shift could replace the merchandise that was being shipped out.

Q. You have referred to a statement at the Board meeting about suitable storage for the cans. What do you mean by that?

A. Well, in storing cannery goods in cans, especially in the Bay area—and we consider ourselves the Bay area due to the fog and humid conditions that we have—cannery goods should not be stored in open sheds or warehouses that are not [2348] suitably insulated so that the moisture doesn't enter

(Testimony of Elmo Martini.)

them. Preferably they should be heated warehouses.

Q. Were any of your warehouses heated and insulated?

A. Yes. The warehouse to which we refer to there as the Molino warehouse, that is an insulated and a heated warehouse.

Q. Was it in 1954? A. Yes.

Q. Could you have used the cold storage facilities for storing the canned products? A. No.

Q. And why not?

A. Because there were still apples in them in both rooms, and before you can store canned foods in there, those rooms must be at least emptied, should be emptied, the refrigeration shut off and the room completely dried. You use several types of driers in there that will dry it out in about two weeks now.

Q. You say it will dry it out in about how long?

A. In about two weeks, ten days to two weeks.

Q. You say that at that time this Board meeting on October 12, you were authorized by the Board to reduce to one shift as soon as possible?

A. Yes, sir.

Q. Did you reduce to one shift after that?

A. Yes. [2349]

Q. When did you reach the decision to reduce to one shift?

A. Mr. McGuire and I spoke of it directly after the meeting, and we were pretty well set to close down. We knew that we were closing down the shift by the middle of the next day.

(Testimony of Elmo Martini.)

Q. You say Mr. McGuire; is that William H. McGuire? A. Yes.

Q. And you spoke about it; can you be more specific when you say you spoke about it?

A. We spoke about it immediately after the meeting. Immediately after the meeting we began to discuss that, and Bill McGuire handles all the incoming cans for me, the incoming cartons, sugar, and there is some problem of merchandise that is already in transit and the cut-off stuff that is scheduled to be shipped from the suppliers.

Q. How do you handle the supplies that are coming in from the suppliers if you are going to reduce your operations?

Mr. Karasick: May the question be limited?

Q. (By Mr. Berke): How did you do it last year? A. We cancelled them out.

Q. Did you discuss this matter of going to one shift with Mr. McGuire on just that occasion after the Board meeting, or were there other occasions?

A. We discussed it the next day also.

Q. When, the next day? [2350]

A. The next morning.

Q. And where did that discussion take place?

A. In the office.

Q. Whose office? A. My office.

Q. Was anyone else present besides you and Mr. McGuire? A. No, sir.

Q. Would you tell us what that discussion was and identify who was speaking?

(Testimony of Elmo Martini.)

A. Well, my concern there was not to pay demurrage on any merchandise coming in.

Q. Was this what you told Mr. McGuire? Please tell us what was discussed between you.

A. We discussed the possibility of paying demurrage on any can cars or sugar cars that were coming in. However, sugar was coming in by truck, but the cans all came in by bulk cars which had to be unloaded directly into the line. So I discussed with him the amount of cars that were coming in and how long it would take us to use them up, and we also discussed, to some extent, shipments that were leaving because we were concerned with warehousing.

Then I authorized Bill, or ordered him to cut down, after our discussion, to cut down to one shift, as of Friday night, and to notify the cannery to pick out the crew and cut the shift. [2351].

Q. You say "notify the cannery." Was there anyone in particular that you mentioned?

A. No, there wasn't. I only referred, when I say "notify the cannery," I referred to the superintendent of the cannery.

Q. Who was the superintendent of the cannery?

A. Mr. Duckworth.

Q. Leonard Duckworth? A. Yes, sir.

Mr. Karasick: What the witness refers to, I move to strike. I think counsel has asked what was said at this conversation.

Mr. Berke: He is explaining it.

Trial Examiner: I think it is material. Go ahead.

(Testimony of Elmo Martini.)

Q. (By Mr. Berke): Do you remember what time of the day this was?

A. The first thing in the morning.

Q. What do you mean by that, "first thing in the morning"?

A. I usually get in at 8:00 o'clock in the morning, 7:30.

Q. And it was around that time?

A. Yes, sir.

Q. Do you recall a meeting of the employees that was held on October 15, in the warehouse in Molino?

A. Yes.

Q. Who arranged or initiated that deal?

A. I asked that they be called in there so we could talk to them. [2352]

Q. Will you keep your voice up?

A. I asked that we have that meeting.

Q. And when you say you asked that you have it, will you explain what you did or said?

A. I asked Mr. McGuire to tell the cannery, warehouses, that we were having a meeting at 4:00 or 4:30 that afternoon. I have forgotten when it was—and that we wanted the entire staff present at that time.

Q. And at what time of the day was it that you made that announcement?

A. It was in the morning of that day, first thing in the morning.

Mr. Karasick: By "announcement" you meant Mr. McGuire?

(Testimony of Elmo Martini.)

Trial Examiner: I am not sure I understand what day it was you told him that.

The Witness: It was on a Friday.

Q. (By Mr. Berke): Is that the same day as the meeting? A. Yes.

Q. You were present at that meeting, were you?

A. Yes. [2353]

* * * * *

Q. (By Mr. Berke): At this meeting, Mr. Martini, of the employees, on the afternoon of October 15, did any of the employees ask any questions or say anything to you during the course of the meeting? [2354]

Mr. Karasick: To this specifically I object, Mr. Examiner. This has been gone into previously by both counsel.

Trial Examiner: I will permit it. Go ahead.

The Witness: There was one thing that I remember definitely was that some employees, several asked me about their aprons and gloves which they paid a deposit on. I told them they would be sent their checks from the office, and that we would include with the checks those of them that turned their aprons in after their shift, that we would send that money with it, so it would save them a trip back to SAGU.

Some of them at that point said they wanted their money right then and there for their gloves and aprons and that they weren't coming back, so we authorized the office to either write them checks

(Testimony of Elmo Martini.)

or pay them cash for their aprons and gloves, and I believe they have a hat that they wear also.

Trial Examiner: What do you mean "we authorized them"? Did you tell somebody?

The Witness: Yes, I told Mr. Wilson, who is our Office Manager.

Q. By Mr. Berke: Mr. Martini, earlier in this hearing you testified with respect to the percentage of employees who returned to work at SAGU in the succeeding season. Have you since testifying checked the company records, personnel records, with respect to that matter? **A.** Yes. [355]

Q. And are you in a position now to give us what those records or your examination of those records show in that respect? [2356]

* * * * *

The Witness: We find that we didn't have over 20 per cent of the old employees that came back.

* * * * *

Q. By Mr. Berke: Mr. Martini, you said "we find." Did you check the records?

A. Well, I checked with Mr. Wilson, Mr. McGuire, and we went through the records and found out who came back and who hadn't. [2359]

Q. When you say "we" you mean you and Mr. McGuire and Mr. Wilson checked the records?

A. Yes.

* * * * *

Q. By Mr. Berke: Mr. Martini, I believe you previously testified you were acquainted with Orice Storey, is that correct? **A.** Yes.

(Testimony of Elmo Martini.)

Q. She was an employee at SAGU last year?

A. Yes.

Q. Mrs. Storey testified that the day after her discharge she returned, and in the presence of Marjorie Byrd saw you outside the tavern and asked you whether she had been fired, and you said yes, and that you also said to her she was a good worker but that "I can't have you talking up this union thing and aggitating" and that you further said, you didn't give a damn what committee she was on.

First let me ask you if you remember the occasion? A. Yes, I do.

Q. Was there such a conversation as I have just related Mrs. Storey testified? [2360]

A. There was not.

Q. Will you tell us, as you recall it, what the conversation was that you had with Mrs. Storey on that occasion?

A. First of all, Mr. Berke, I don't remember of Mrs. Byrd being there. However, I do remember that Mrs. Storey approached me and asked me directly why she was fired. To that I answered that she knew why she was fired and walked away from her. That is all the conversation there was.

Q. Did you make any reference on that occasion to talking with her about you couldn't have her talking up this union thing and aggitating, and you didn't give a damn what committee she was on?

A. No, sir; I did not.

* * * * *

Q. (By Mr. Berke): Mr. Martini, did you know

(Testimony of Elmo Martini.)

an employee by the name of Mary Ann Russell?

A. I know the name.

Trial Examiner: A redheaded girl?

Q. (By Mr. Berke): Can you recall in your mind's eye a girl by that name?

A. Yes; I believe I recall her.

Q. Mrs. Russell testified that about two weeks before the [2361] layoff, at a break about 9:30 a.m., one of the girls asked you why you wouldn't go union, and you said you would shut your plant down before going union and would not pay union wages. You further testified that at various other times you said that, or she testified that you said that. Do you recall such an incident?

A. No, I don't.

Q. Did you at any time, either in response to a question by one of the employees or otherwise, make such a statement as I have here indicated to you that Mrs. Russell testified about?

A. I have not.

Q. Do you recall Lila Laymon, an employee at SAGU last year? A. Yes.

Q. Mary Ann Russell testified that she and Lila Laymon, about two weeks after October 15—and Miss Laymon also so testified—saw you in the warehouse at Molino in the morning and asked if they could be rehired, and that you said that you didn't need any help then, that you would later on; that you further stated that unions were no good as far as a cannery was concerned, but in an auto company like GMC, unions would be all right. You

(Testimony of Elmo Martini.)

further said to them, "You should have thought it over before jumping in," and that you then asked for their addresses and telephone numbers. [2362]

First, let me ask you: Do you recall such an incident after October 15, in the warehouse where Mary Ann Russell and Lila Laymon talked with you?

A. Yes; I remember that.

Q. Did you state to them what I have here related they testified as having been said by you?

A. I never said that.

Q. Do you recall the conversation you had with them?

A. Yes.

Q. Will you please tell us what it was?

A. I recall they asked me if they could come back to work, and I told them then that I wouldn't know if we needed any help, but it would be a good idea to get their name in and should somebody leave our present employ, they could replace them. So at that point I took their names and addresses and turned them in to the office.

Q. Did you make any reference to unions: "They are no good as far as a cannery is concerned. They were all right for an automobile company," and that they should have thought it over before jumping in?

A. I did not.

Q. Did you say any such thing to them, whether it was at the time they testified or at any other time?

A. No; I never said that.

Q. Do you recall an employee by the name of Pauline Ploxa? [2363]

A. By name only.

Q. Do you recall what she looked like?

(Testimony of Elmo Martini.)

A. No.

Q. Mrs. Ploxa testified that about three weeks after being hired, she testified that she was hired on September 13. While she was working at the slicing machine, she asked you how long the night shift would last, and you said that it would last way into December.

Do you recall her asking you that question and you giving her that answer?

A. I recall that question being asked me by numerous women in the cannery.

Q. You do not recall Mrs. Ploxa asking you that question specifically?

A. No; but I don't doubt that she possibly did, because I really don't know what she looks like.

Q. You say you were asked that question by employees at the plant last year? A. Yes.

Q. Do you recall which employees? A. No.

Q. Do you know about when it was that you were asked that?

A. Oh, I was asked on numerous occasions during the canning season.

Q. And did you respond to the question? [2364]

A. Yes.

Q. What did you say?

A. I always answered it along those lines, that it was hard for me to tell when the night shift would end. It could end in two or three weeks, or it could run until after Christmas, depending upon the general condition of the season itself. [2365]

* * * * *

(Testimony of Elmo Martini.)

Q. (By Mr. Berke): At any time that any of the employees asked you about how long the shift, the night shift, would work, did you ever at any time tell any of them that it would definitely work way into December? A. I did not.

Q. Mrs. Ploxa also testified that at the October 15 meeting of the warehouse employees, you told the employees, "I will see you next year, those who are not on the list."

Did you make any such statement?

A. I did not.

Q. Mrs. Ploxa also testified that after the meeting of October 15, right after, she and Ida Fishelson talked to you. Do you have an employee by the name of Ida Fishelson, or did you last year?

A. Yes. [2366]

Q. Mrs. Ploxa said that she and Ida Fishelson talked to you and that Ida said she had a warehouse in Santa Rosa which you could rent and that you replied, "There was more to it."

Do you recall a conversation in which Mrs. Fishelson stated she had a warehouse in Santa Rosa you could rent?

A. I did not.

Q. Did any employee, to your knowledge, offer to rent you a warehouse in Santa Rosa?

A. No, sir. [2367]

* * * * *

Q. (By Mr. Berke): I believe you previously testified that you have an employee at SAGU by the name of Clarence Storey; is that correct?

(Testimony of Elmo Martini.)

A. Yes, sir.

Q. Mr. Storey testified here that sometime in September you said to him, "Mine and Storey's horses don't pull together. We can't get along."

Did you ever make such a statement to Mr. Storey, whether it was in September or any other time? A. No, I didn't.

Q. Mr. Storey also testified that on September 25, at about 11:45 a.m., you came out of the south door in the cannery and called him over into the street on company property and asked him, "Do you know what your wife is doing? She is forming a committee on the night shift. You go out and fire her."

Mr. Storey said to you, "That is your fucking job. If you want to fire her you go fire her. I only work here. You are the boss."

Was there such a conversation between you on that date or at any other time?

A. There was a conversation, but it was not that conversation that you just read.

Q. Do you recall September 25?

A. Yes.

Q. Did you talk with Mr. Storey on that day?

A. Yes. [2369]

Q. Where did you talk with him?

A. I talked with him right there near his dumping station, which is at the south end of the cannery, off to one side.

Q. Was there anyone else present besides you

(Testimony of Elmo Martini.)

and Mr. Storey in the conversation, or in the immediate presence of the two of you?

A. I believe Mr. Duckworth was there.

Q. Will you tell us what was said and by whom at that conversation?

A. Yes; I merely told Mr. Storey that I had just discharged his wife and that the next time that I had a complaint on anyone of my people that he had left his post, that I would fire him also, and I walked away. [2370]

* * * * *

Q. (By Mr. Berke): Was Tony Bondi present at that time? A. No.

Q. Mr. Storey testified that his wife was on her own time and you said, "Why don't they get their fucking committee and get it over with," and that you further said, "I am the boss. Why in the hell don't you get Bertolucci and Rhodes to shut the goddamn thing down. If you don't, I am going to," and you stated you forbid talking about the union on company property.

Did you so talk to Mr. Storey on that occasion or on any other occasion? A. I did not.

Q. Do you recall an employee by the name of Eloise Munger? A. Yes.

Q. She testified that on September 10 or 11, 1954, before school started she told you she was getting married in October and wanted to work part time, and that in the course of that conversation you asked her if they were getting a square deal and if she knew that if the union got in she couldn't

(Testimony of Elmo Martini.)

work part time, that the union tried to get in two years before, and if you could prevent them this year they couldn't get in before four or five years.

Was there such a conversation with Eloise Munger? [2371] A. There was not.

Q. Did you ever make such a statement to her, whether it was before school started in September, 1954, or any other time, or any other employee?

A. No, sir.

Q. Eloise Munger testified further that on the day Mrs. Storey was fired, she and John Chames were in the SAGU office at noon and you came rushing in, slammed the door, and screamed, "That damned Storey woman. I am going to get rid of her. She is always talking union."

Did such an incident occur, Mr. Martini?

A. No, sir.

Q. Do you remember the day Mrs. Storey was discharged? A. Yes, I do.

Q. What day was that?

A. On September 25.

Q. What year? A. 1954.

Q. And at any time during that day, did you rush in to your office and slam the door and either scream or shout out, "That damn Storey woman. I am going to get rid of her. She is always talking union."? A. I didn't do that.

Q. Do you recall an employee by the name of Mrs. Tripp? A. Yes. [2372]

Q. Did she work for the company last year?

A. Yes.

(Testimony of Elmo Martini.)

Q. Mrs. Tripp testified that two weeks before October 15 you said to her, "It would be nice if we can get Storey,"—referring to Mr. Storey—"over to the can car. He would be away from his job and we would have an excuse to fire him."

Did you make such a statement to Mrs. Tripp, whether it was two weeks before October 15 or at any other time? A. I did not.

Q. Did you make any statement to Mrs. Tripp or to any other employees that you would like to find an excuse to fire Clarence Storey?

Mr. Karasick: Object. The question has been asked and answered.

Trial Examiner: Overruled.

The Witness: No.

Q. (By Mr. Berke): Mrs. Tripp further testified that about three weeks before October 15, you, in the presence of Tony Bondi and someone else whom she couldn't identify, stated you knew your biggest trouble maker, who your biggest trouble maker with the union was, and you pointed in the direction of Clarence Storey.

Did such an occurrence take place, Mr. Martini?

A. It did not.

Q. Did you ever make such a statement, that Mr. Storey was [2373] your biggest trouble maker with the union? A. No, sir.

Q. You recall the election that was held at the plant in October of 1954? A. Yes.

Q. Mrs. Tripp testified that on the day of the election she met you at Molino Corners at the filling

(Testimony of Elmo Martini.)

station at about 7:00 p.m., and that you asked her how she voted and that she laughed. She said she was surprised she was layed off and that you said, "Oh, were you," and asked her name and telephone number and told her you would call her in a few days.

Do you remember an incident with Mrs. Tripp at Molino Corners in the filling station?

A. Yes.

Q. Did the conversation, as I have related it here, as having been testified to by her, occur at that time?

A. The conversation occurred, but it was not in those words there, Mr. Berke.

Q. On the occasion of your conversation with her at the filling station at Molino Corners, who was present besides you and Mrs. Tripp, if anyone?

A. I don't remember anyone else. Undoubtedly there was, though.

Q. I mean, within the immediate area. [2374]

A. Just the two of us.

Q. Did you have a conversation with her?

A. Yes.

Q. Would you please relate it and identify who is speaking?

A. I remember definitely that I asked her if the election returns suited her, and then, of course, I am sure she was having a beer, so I offered to buy her one, and she told me then that she was either separated from her husband or her husband had died and she has a little girl about three or four

(Testimony of Elmo Martini.)

years old, and she sure needed the work. She wanted to go to school, and she told me she had been laid off, which I didn't know, and so I told her then that if she would put her name in to the office there would undoubtedly be somebody that would leave prior to the end of the season and she could get back on. To that, she gave me her telephone number and her address and I turned it in to the office.

Q. Did you, in the course of the conversation, ask her how she voted? A. How she what?

Q. How she voted. A. No, I did not.

Q. Do you recall an employee by the name of Gloria Lindsey? A. Yes.

Q. Did she work for SAGU last year?

A. Yes. [2375]

Q. Gloria Lindsey testified that while working at the squirrel cage in the cannery sometime in August, you asked her and Gloria Pate if they worked for the union, and you said to them that they shouldn't be, that in the long run it would be better for them to stick with you and that they would get a 5 cent raise next year, and the year after that \$1 an hour.

Did you, during the month of August, 1954, ever ask Gloria Lindsey and Gloria Pate if they were for the union? A. I did not.

Q. Did you, during that month, tell them they shouldn't be for the union, that in the long run it would be better for them to stick with you, that they would get a 5 cent raise next year and the year

(Testimony of Elmo Martini.)

after that \$1 an hour? A. No, sir; I did not.

Q. Did you ever tell either one of those two employees, whether it was August or any other time during the 1954 season, the matters that I have related here as having been testified to by Gloria Lindsey? A. No, I didn't.

Q. Gloria Lindsey also testified that sometime in October you said to her and Gloria Pate that if the plant would go union you would lose too much money and you would close down in Santa Rosa.

Did you make such a statement? [2376]

Trial Examiner: Let me hear the last part of the question.

(Question read.)

The Witness: No; I didn't make such a statement.

Q. (By Mr. Berke): Did SAGU have a plant in Santa Rosa in 1954? A. No, sir.

Q. Did you say anything to them about you had to close down in Santa Rosa? A. No.

Q. Did you say anything at all about closing down the plant to Gloria Lindsey or Mrs. Pate, or either one of them, or Gloria, or either one of them, if the plant went union?

A. No, sir; I did not.

Q. Gloria Lindsey also testified that after Mrs. Storey's discharge, while Gloria Lindsey was working in the can car, you asked her if she was trying to change them over to the union, and that she said you would put her over by Mrs. Storey so the two of them could have a ball.

(Testimony of Elmo Martini.)

A. I didn't say that.

Q. Did any such conversation take place at, in or near the can car with Gloria Lindsey?

A. No, sir.

Q. Did you ever say that to Gloria Lindsey? Whether she worked in the can car or elsewhere, during the 1954 season at [2377] SAGU?

A. No, sir.

Q. I don't know whether I asked you this or not. Do you recall an employee by the name of Gloria Pate? A. Yes.

Q. She worked for SAGU during the 1954 season? A. Yes.

Q. Gloria Pate testified in this proceeding that on October 18, about 9:00 a.m., she saw you near the cannery and told you she had been laid off and wanted to know why. You said that you did not know, and you asked her if her name was on the list, and then she told you that you were hiring other people right now and you or they were retaining them on seniority.

First, let me ask you: Do you recall that conversation with Gloria Pate on October 18?

A. I recall talking to Gloria after the layoff, yes.

Q. And do you recall where that conversation took place?

A. Yes. I was coming from the scale house, which is north of the cannery, and I met her between the cannery and the warehouse.

Q. You say it was after the layoff? Could you

(Testimony of Elmo Martini.)

be a little more specific with relation to when you commenced the scale shipping?

A. On the following Monday. [2378]

Q. Following Monday?

A. Following the layoff day of Friday.

Q. Was there a conversation between you and Gloria Pate such as I have related that she testified to here? A. No.

Q. Did you have a conversation with her on that Monday? A. Yes.

Q. Tell us what the conversation was, please.

A. She told me that she was laid off, and I said, "Were you?" She also told me that she needed the money, and I told her I had nothing to do with the list, and also told her that she should apply at the office, that there might be a vacancy, and she could get back on it at a later date. That is the extent of the conversation I had with Gloria.

Q. Do you remember a female employee by the name of Joanne Chames?

A. I don't recall her right at the moment, no.

Q. Do you know her by the name of Joanne Schwartz? A. No.

Q. Well, Joanne Chames—since married and now known as Joanne Schwartz—testified that in the middle of the week sometime about the second week in September, while she was working on the slicer or belt—she wasn't sure which—a screen was not letting the chips fall out of the apples; she told you the screen had to be changed and you said you couldn't [2379] change it then but that you would

(Testimony of Elmo Martini.)

later; that it was changed three days later, three days after she told you, and on a Saturday.

Do you remember a conversation with an employee, whether it be Joanne Schwartz, or some other employee concerning the screen at the slicer or the belt?

A. Yes. I remember it was at the shaker table. I don't remember this particular woman, but I do know that in walking past there, the entire crowd was after me to change that screen because it was letting too many chips in.

Q. When you say "the entire crowd," who do you mean?

A. I mean the girls at the table, and I am sure at that time we must have had about 80 there. They—there were three on each side, and two on the side of the elevator.

Q. Will you tell us the conversation?

A. Well, the girls just asked me about changing the screen because it was involving a lot of work for them. Any screen that lets the chips run over the top of it and onto the belt will create a lot of extra work for the women that are behind it, and of course we were doing the best we could, the best we could with the equipment that we had. [2380]

* * * * *

Q. Was that screen changed? A. Yes.

Q. How long after it was brought to your attention?

A. Oh, at the time it was brought to my attention we already knew about it and we had to get a

(Testimony of Elmo Martini.)

new one. All screens of that nature are woven for us by, I believe, Link Belt in San Francisco. They have the only metal weaving shop in San Francisco, and it is all custom made. It took a few days to get it up here.

Q. And so was the change made as soon as you could get a new screen? A. Yes.

Q. Mr. Martini, is SAGU a member of the co-op cannery? A. Yes.

Mr. Karasick: Object to the question and move the answer [2382] be stricken on the ground it is not the best evidence. It is an opinion and conclusion of the witness.

Trial Examiner: Overruled.

Q. (By Mr. Berke): Do you know when SAGU became a member of the Sebastopol Co-op Cannery?

Mr. Karasick: Object.

Trial Examiner: Overruled. You may have a continuing objection.

The Witness: We became members there—SAGU did, or we paid our membership fees on January 25, 1951.

Q. (By Mr. Berke): And to your knowledge, did SAGU remain a member of the Sebastopol Co-op Cannery at that time?

Mr. Karasick: Object.

Trial Examiner: Overruled.

The Witness: Yes, we are members of the Sebastopol Co-op Cannery.

Trial Examiner: Not are you, but have you been?

(Testimony of Elmo Martini.)

Q. (By Mr. Berke): Would you like the question read to you again?

A. Yes, if I answered it wrong.

(Question read.)

The Witness: Yes.

Q. (By Mr. Berke): To your knowledge, Mr. Martini, has SAGU remained a member of the Sebastopol Co-op Cannery since January 25, 1951?

A. Yes. [2384]

* * * * *

Q. Does this humidity or fog that you have described have an effect upon the tin cans in which you store the apple product? A. Yes, it does.

Q. What effect does it have upon tin cans in which apple products are packed?

A. It will cause them to rust.

Q. Tell us whether or not that is a reason for requiring storage of such tins of apple products in insulated warehouses.

A. In Sebastopol that is possibly the only reason for the use of good insulated warehouses.

Q. If cans packed with apple products rust, tell us whether or not that has an effect upon the grading of the product.

A. It doesn't necessarily have any effect on the inside grade of the product, but it certainly has an effect on the sales value of the particular can.

Q. What effect does it have?

A. Well, in short, I would say that it would cut its sales value in half. [2388]

* * * * *

(Testimony of Elmo Martini.)

Q. (By Mr. Berke): What happens, if you know, Mr. Martini, to cans containing apple products that are affected by rust; that is, what is done with them?

A. Well, we will go through a particular lot that shows rust, and in many cases some of the rust will be rubbed off with either steel wool or some such cleaner. Those that are too bad, where the rust is already indented into the metal will be discarded. If the rust hasn't gone through, we sell them to what we call "junkies" or fellows that buy nothing but dents and rusts in cans that are not in No. 1 condition.

Q. Are those that are sold to so-called "junkies" sold for the same price as the ones where you are able to remove the rust? A. No.

Q. Are they sold for more or less?

A. They are sold for less.

Q. And then you said those where the rust had gone through the tin are discarded. What do you mean by that?

A. Well, if the rust is completely through a can where it has caused it to swell, that is discarded and thrown out into the junk heap, or buried, or dumped in the city dump. [2389]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Karasick): I think you have made a statement that last year there was a spoilage of about 700 tons of apples, or a loss of that?

A. Yes, sir.

(Testimony of Elmo Martini.)

Q. Do you remember last June you had a meeting, or made a statement that this would have processed apple sauce, some 40,000 cases, I think you estimated, which bring approximately \$100,000 to the growers?

A. Yes.

Q. And this is about the price that the growers would have gotten, about \$2.50 a case?

A. \$2.50 a case? No, a little above that. [2391]

* * * * *

Q. (By Mr. Karasick): Was that the maximum or minimum?

A. \$2.70 was my minimum selling price. [2392]

Q. \$2.70 was the minimum selling price per case Choice? What was the maximum you got last year for Choice per case?

A. \$2.80.

Q. Then \$2.80 would not represent the average price last year for Choice, would it?

A. No, sir.

Q. What was the average?

A. For Choice?

Q. Yes. A. \$2.70 or slightly above.

Q. Approximately \$2.70 was the average price per case for Choice?

A. Yes.

Q. What was the average price per case for Fancy last year?

A. I would say \$2.80 average. [2393]

* * * * *

Q. What percentage of the apple crop last year was canned by SAGU as distinguished from fresh fruit sale?

A. Over 50 per cent.

Q. Was canned? A. Yes.

(Testimony of Elmo Martini.)

Q. Was this usual or unusual?

A. Well, I only know two years, over the past two years.

Q. Well, may I direct your attention to this, before you answer, Mr. Martini, without interrupting you. I notice you were pausing there. You know what the experience at SAGU has been since 1951, even though you weren't here as General Manager all that time, don't you? You have seen the books and records? A. Yes.

Q. Since the cannery has been at SAGU since 1951, is 50 per cent canning as against a 50 per cent sale of fresh fruit the approximate experience each year?

A. Will you read that question for me?

(Question read.)

Mr. Berke: That assumes something not in evidence and misstates the evidence.

Trial Examiner: I will sustain the objection. His testimony was that more than 50 per cent was canned. [2406]

Q. (By Mr. Karasick): Did you say more than 50 per cent was canned? A. No.

Q. Or was that approximate?

A. I said that for the period of 1954, but we weren't talking about 1951.

Q. No. Maybe we are confused here. Did I understand you correctly that in 1954 approximately 50 per cent of the apples received ultimately became canned products; is that what you told me?

A. Possibly a little bit more.

(Testimony of Elmo Martini.)

Q. Appreciable or a substantial amount? I want your best estimate of the percentage.

A. Say 55 per cent.

Q. Was 55 per cent of the apples received during the season being canned usual or unusual in terms of SAGU's past experience this season?

A. It was pretty close to the 1953 season, Mr. Karasick, but it was unusual, if you date back beyond that date.

Q. To when?

A. To 1950, we will say, through '51.

Q. In 1950 there was no cannery.

A. '51 and '52; it would be unusual if you would take those two years into account.

Q. What would be unusual? [2407]

A. We didn't can that much during '51 and '52.

Q. Your facilities weren't as great, were they?

A. In '51, no.

Q. You only had one shift in '51, didn't you?

A. Yes.

Q. In '52 you didn't have as big an operation as you did in '53, did you? A. No.

Q. Do you remember talking about the shaker belt? A. Shaker screen?

Q. Yes. A. Yes.

Q. How big a screen is it?

A. It is a 4 x 8, 4 x 8 feet, 4 feet wide and 8 feet long.

Q. And could you operate without that screen? Let me ask you this, first, to make the question in-

(Testimony of Elmo Martini.)

telligible to you, Mr. Martini: The screen was used for what process, slices or sauce or both?

A. Slices only.

Q. Could you operate in slices without that screen at all?

A. Oh, I suppose you could. Those screens aren't too old. They are quite a new type of machinery.

Q. By some chance, if the screen was completely broken and couldn't operate, would you as a good operating manager, operate if the screen were broken, or would you wait until you [2408] got a new one?

A. You could operate by extending your finish line there. I suppose before they had shaker screens that is the way they did it. They would run all the apples on the belts and women would sort out the chips from there. The only difference would be that you would be using probably three times the amount of women that you normally would use with the shaker screen.

Q. And if—and it might affect the quality of the product, so it would be down graded. You might get less thorough inspection as a result, is that right?

A. It could be.

Q. This screen helps that, doesn't it?

A. It helps, yes. It certainly gets rid of the small things that are very difficult to take out.

Q. Did you have an extra one of these shaker screens in the event one was to break or become ineffective?

A. No, sir; we do not.

Q. How long had that shaker screen been in?

(Testimony of Elmo Martini.)

A. Just during that season, during a portion of that season. We had another type before that that wasn't adequate.

Q. That screen had been in use for sometime and then was replaced with the screen you are talking about?

A. The screen that we are talking about now, the 4 x 8, was put in there over a weekend. I ordered the screen from Link [2409] Belt and it arrived at our plant, so we pulled the present screen that we had and put this one in its place.

Q. The original screen, how long was that in operation?

A. The year previous and up to the time we put the new one in.

Q. It had worked previously?

A. Well, it worked. I wouldn't say it worked all right. That is why we removed it.

Q. Did you have any complaints about it before this complaint? A. About what?

Q. The shaker screen?

A. Oh, yes. We used to have complaints. The other screen was a lot smaller. It was only a 2 x 4. This was just twice the size, and apples used to go through there sometimes six inches deep, and they would shake their heads off, but they wouldn't shake the chips out.

Q. What was the matter with this screen?

A. It was too small.

Q. Too small?

(Testimony of Elmo Martini.)

A. Yes. The holes in the screen itself were too small.

Q. And this was or wasn't the first time it came to your attention that the holes were too small?

A. We knew they were too small.

Q. You did? [2410]

A. Usually those things are brought to my attention by the employees. We knew about it, and we had one on order by the time that was being brought to my attention by various people on that line.

Q. How long had you known that it was too small? A. We knew it an hour afterwards.

Q. The second week in September, is that right, this conversation took place? A. Yes.

Q. This matter came up, right? A. Right.

Trial Examiner: Just a minute. You interrupted the witness. I wanted to hear what his answer was. I think he said, "We knew it an hour after it was put in," is that right?

The Witness: Yes.

Q. (By Mr. Karasick): And then it was in, I think you said, the prior season and was in this season; is that right? A. Yes.

Q. It was in this season or last season, I mean, 1954 only? A. I don't get you.

Q. When was the screen which was finally replaced first put into the operation, Mr. Martini?

A. The one that was replaced was put into operation at the beginning of the season in 1953.

Q. And was used during the 1953 season? [2411]

A. And into the 1954 season.

(Testimony of Elmo Martini.)

Q. And was replaced sometime in the latter part of September, 1954; is that right?

A. I don't remember the exact day. I would have to check the record on that. I suppose that is about right.

Q. I think you testified that your main reason—well, before the 1954 warehouse was completed, the No. 5 that you have talked about, where did you store the canned product that was processed by SAGU, 1952, '53 and '51?

A. The cannery warehouse proper has—well, it did at that time, anyway, had 100,000 case storage in the cannery building itself.

Q. Wait just a minute there, if you don't mind. The cannery warehouse, that is the one that is part of the cannery; is that right? A. Yes.

Q. And that had a storage capacity of what?

A. Approximately 100,000 cases, I judge, at that time.

Q. What time was this?

A. Well, you mentioned the prior years.

Q. 1951, '52 and '53.

A. And '54. It was quite a bit larger than it is now, too.

Q. So 1951 through 1954 was greater capacity?

A. Yes.

Q. It was just this year that you have enlarged the plant to [2412] accommodate greater production facilities? A. 1955, yes.

Q. Was that the only place that you used for storage, just at the cannery warehouse at SAGU?

(Testimony of Elmo Martini.)

A. No. I believe one year we stored in our No. 2 packing shed in Sebastopol.

Q. What year was that?

A. I don't know. I am not too sure whether it was '53 or '52. It seems to me like it was '52.

Q. And what other facilities have you used for storing?

A. We used porches at SAGU, at the Molino plant.

Q. What other facilities?

A. We used the cold storage rooms, or one of the rooms. We never used the other. We have only used one.

Trial Examiner: During 1954?

The Witness: Yes; we went into cold storage early in December after the plant was empty and dry. We moved a lot of our merchandise from other sections of the plant into the cold storage.

Q. (By Mr. Karasick): What other storage facilities have you used in the past?

A. That is it; that covers them, the cold storage, No. 2, porches, and the regular cannery. [2413]

* * * * *

Q. (By Mr. Karasick): By that, what do you mean? Have you been connected or associated with any company or enterprise in these fields in the past?

A. With several.

Q. With several? A. Yes.

Q. Which have they been, Mr. Martini? [2428]

A. I was connected with my father.

Q. What enterprise was that?

(Testimony of Elmo Martini.)

A. Well, it was known then as the Old R. Martini Wine Company.

Q. Where was that located?

A. Where I now reside.

Q. Where is that?

A. Eight miles west of Santa Rosa.

Q. Not in a town? A. No.

Q. And what other enterprise have you been engaged in?

A. Then I worked for W. A. Taylor and Company.

Q. Where were they located?

A. We were located in Santa Rosa.

Q. When was this? You began to say something and I interrupted you.

A. 1943 to or through 1952. [2429]

* * * * *

Redirect Examination * * * * *

Q. (By Mr. Berke): I believe you testified under Mr. Karasick's examination that the No. 2 packing shed in Sebastopol was used for storing SAGU's canned products sometime prior to 1954; is that correct? A. Yes.

Q. Do you recall what year it was that it was used for that purpose?

A. No. But my recollection would be that it was 1952.

Q. And did anything happen to the canned products that were stored in that packing shed?

A. Yes.

Q. What?

(Testimony of Elmo Martini.)

A. Well, there was a considerable amount of rust that the [2433] boys tell me they ran into after it had been stored there for several months.

Q. You made reference, in the description of other space that was used for storing canned goods, to porches. What porches were those?

A. There are two major porches at the Molino plant, Mr. Berke. One being on the east side of the cold storage plant and the other one on the south side of the cannery building proper.

Q. Looking at General Counsel's Exhibit 22, which shows the four buildings at Molino premises, will you point to where the porches are with respect to those buildings?

A. There is one porch here (indicating).

Q. You are pointing to that building described on the diagram as "Cold Storage"? A. Yes.

Q. And is it correct that you are pointing to the east end of that building? A. That is right.

Q. And you say there was a porch there?

A. Yes.

Q. And where is the other porch that you had reference to?

A. The other porch is on the southern part of this building here.

Q. You are pointing to the southern portion of the building [2434] on the diagram, General Counsel's 22, indicated as the cannery and warehouse?

A. Yes.

Q. Were those porches used to store canned apple products at SAGU?

(Testimony of Elmo Martini.)

A. We used them some last year in 1954, and in 1953 I had a somewhat sad experience with the porch on the cannery warehouse where I had approximately 25,000 cases there that we ran into a rain storm coming from the southern end of the county. The best we could do was put some freight cars there and keep the rain off them. However, the damage to them was quite extensive.

Q. What porch was that?

A. That is the porch on the south side of the cannery. [2435]

* * * * *

Q. (By Trial Examiner): If you had storage facilities in 1954 for additional canned goods, would you have had enough apples on supply to operate two shifts the rest of November? A. No.

Q. Can you explain the reason for that in terms of supply of late apples, or anything like that?

A. Well, Mr. Hemingway, at the time of the layoff there were no more apples than what we stated, approximately 250 tons. I am not going to sit here and tell you that I couldn't run longer than that, but I couldn't have run fruit that we had, that our own growers have. We have often had growers in the Watsonville section deliver us fruit on a co-operative basis, so you just don't read into the future those things that could happen where other sections could come in with apples and have us process them for them.

Q. After October 15, 1954, did you receive apples

(Testimony of Elmo Martini.)

from any [2449] source besides your own growers?

A. No, we did not.

Q. Had you in more than one of the previous years?

A. I only know of one previous year where we received apples from another section.

Q. How long would the canned goods remained stored on a porch each of the cold storage plant before they were moved out?

A. I don't remember just how long we kept them there.

Q. Do you remember when the porch was finally empty?

A. No; I don't remember that, but I know this: that we shipped all shipments that were going out. We tried to take off that porch so that we would get the stored fruit back further in toward the end of the wall. There is one section of that porch also that is sealed. It has siding all around it. It was an open shed, and for this purpose we have since sealed it. That was done in 1953.

Q. Do you remember when you started putting canned goods on that porch during the season last year?

A. No; but I would say it was along sometime in October.

Q. I would like to get the picture here. Was it customary to keep canned goods at that porch all the time because it was easier to get out the shipment, or did you only put it on the porch after the warehouse filled up?

(Testimony of Elmo Martini.)

A. No; we only put it on the porch after the warehouse filled [2450] up. I might add this too: that that porch is used for storage of fresh fruit cartons, fresh fruit boxes, shook, spray materials, and we have kind of a tough time in rearranging what is being stored there to make room for something else.

Q. What was the storage capacity for canned goods on the porch?

A. I don't know what it would be. At the cold storage plant?

Q. Yes.

A. If you could free the entire thing, I would say that it would hold 50,000 cases.

Q. Would that be about half the amount of the regular warehouse?

A. That would be half the amount of the regular warehouse at the cannery but not half of the other one.

Q. That is another thing I want to get straightened out. I believe you said there was a porch on the south side of the cannery in which you had previous years stored canned goods. A. Yes.

Q. Is there a warehouse space at the cannery in addition to that? A. In addition to the porch?

Q. Yes. A. Yes. [2451]

* * * * *

Q. (By Trial Examiner): You say that the cannery warehouse would hold 100,000 cases?

A. We classify it as a 100,000 case warehouse, or we did at that time.

(Testimony of Elmo Martini.)

Q. And the new warehouse, that is, the remodeled one which you designated as warehouse No. 5 on General Counsel's Exhibit 22, would hold how much?

A. Well, at the outside, it will hold 180,000.

Q. Was all that space filled in 1954?

A. Yes.

Q. Both of those areas? A. Yes.

Mr. Berke: Let the record show what reference is meant by "both of those".

Trial Examiner: Warehouse No. 5 and the warehouse in the cannery.

Q. (By Trial Examiner): Is that right?

A. Yes.

Q. And can you tell me which one filled up first, if that is the case?

A. Well, they will fill up simultaneously; it all depends. On one side we keep maybe sliced apples, and on the other side we may be running sauce, so it is hard to tell which way we do it. Sometimes we run fruit from this side to this one to make the—to make it handier for the boys in the shipping room. [2453]

Q. At what point were you forced to discontinue storing in those warehouses because they were full?

A. Well, they were full, I would say, around the first part of October. We were having trouble in finding storage space in warehouses then.

Q. Between then and the end of the canning season, where did you store your canned goods?

A. We stored it here, because we kept shipping

(Testimony of Elmo Martini.)

out of these places, out of these two warehouses and kept filling up the places that we shipped, and we moved some down to this porch on the east side of that one (indicating).

Q. East side of that? A. Yes.

Mr. Berke: East side of what?

Trial Examiner: Cold storage plant.

Q. (By Trial Examiner): Well, when you shipped out, you didn't try to ship out from the porch before you started taking them out of warehouse No. 5?

A. We either shipped out of there or shipped out of here.

Q. When you say "here" you mean warehouse No. 5?

A. Yes; it all depends on what we were shipping. We had three or four—oh, a lot of things there, so in some cases you might have had an order for a top Fancy applesauce, and it had to come out of this warehouse.

Q. Warehouse No. 5? [2454]

A. Yes; because it was stored there, whereas we would have liked to ship it from the porch, but it wasn't stored there.

Q. You just had the Choice there?

A. Well, we had some slices there also. I remember having some slices down there.

Q. Have you ever had any experience with cans rusting on the porch of the cold storage plant or in the warehouse of the cannery proper? A. Yes.

(Testimony of Elmo Martini.)

Q. How long do cans have to be in that place before they will start to rust?

A. It all depends, Mr. Hemingway, what the weather conditions are. If you should have heavy rains with very humid weather, they will start rusting in two weeks, sometimes even sooner than that. If you should have an Indian Summer where you don't have any rains until December, that fruit is all right out there. We often cover it with paper.

Q. During the year before the next canning season starts, do you ultimately get rid of all the canned goods that are in the warehouse?

A. No, not always.

Q. You sometimes carry them over a second year?

A. More often we do than times we don't.

Q. Where do you start canned goods—where did you store canned goods that coop canned for you? [2455]

A. They were all put in the No. 5 case warehouse because they were stacked bright.

Q. Without labels?

A. No, just put on pallets, one can on top of the other. There were no cases to them at all.

* * * * * [2456]

Q. (By Mr. Berke): Were any of the apples in 1954 sent to driers by SAGU, Mr. Martini?

A. Yes.

Q. When did you begin that season to send some of the SAGU apples to driers?

* * * * *

(Testimony of Elmo Martini.)

The Witness: We started going to driers from our SAGU Station plant almost immediately when we started that plant up in July, sometime in July, and shortly thereafter we [2462] moved culls from that plant into the various driers.

Q. (By Mr. Berke): In the month of September when you testified that you started again sending apples to Sebastopol Coop for processing there, did you send any of the apples to driers at that time? A. Yes.

Q. Which driers?

A. Well, I am sure of Pleasant Hill Drier. They handle a lot of apples, so we go there quite a little bit. I am not sure of the other five. Some of them may shut down, like the Molino Drier shuts down very soon after the season. The Green Valley Drier shuts down after the Gravenstein season generally, so Pleasant Hill was open and I know we went there and probably went to Sebastopol Processing. However, I am not too sure of Sebastopol processing. I am sure of Pleasant Hill.

Q. Were the driers in 1954 able to process all the apples that you sent them? A. No. [2463]

* * * * *

Q. (By Mr. Berke): Will you tell us the reason for that, to your knowledge, Mr. Martini?

Mr. Karasick: Object to that.

Trial Examiner: Overruled.

The Witness: The driers have their own fruit company; that is, growers that are bringing directly from the field in to the drier.

(Testimony of Elmo Martini.)

Q. (By Mr. Berke): Are you telling us about the 1954 season?

A. Yes. To the extent where they are usually pro-rating their individual growers, those that have fruit they must take, they will pro-rate the growers maybe to a load a day because of a glutted fruit market. Their yards are practically covered in fruit, so rather than get too much in there, they leave it in the orchards and let the growers bring in so much. They would do the same for us.

If we have made arrangements to haul fruit in to the drier, they will let us take in maybe a load a day, where we should be taking ten loads a day.

* * * * * [2464]

Q. (By Trial Examiner): Did the plant with which you were connected for Taylor discontinue business while you were connected with it, or any other plant? A. Yes.

Q. Which ones?

A. The Santa Rosa plant, the plant that I now have out there. [2470]

Mr. Berke: Out where?

The Witness: Six miles west of here, which I mentioned before. Those two were shut down and they maintained the Hollister plant, which is located nine miles east of Hollister.

Q. (By Trial Examiner): Do you know whether or not the union in any way was a contributing cause in the closing of those plants?

A. Well, one plant was not union. The larger one of the two was non-union.

(Testimony of Elmo Martini.)

Q. That was not the one in Santa Rosa?

A. The one in Santa Rosa was union. No, I wouldn't say that.

Trial Examiner: Anything further?

Mr. Karasick: Yes.

Q. (By Mr. Karasick): When did the Santa Rosa plant shut down, what year?

A. I think it was 1951. Well, it was '51 or '52.

* * * * * [2471]

PAUL A. BONDI

called as a witness by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

* * * * *

Direct Examination

Q. (By Mr. Berke): Mr. Bondi, are you also referred to as Tony Bondi? A. Yes, sir.

Q. Do you own an apple ranch or orchard?

A. I do.

Q. Did you last year in 1954? A. Yes.

Q. For how many years have you owned a ranch? A. Since 1936.

Q. And how many acres did the ranch contain last year? A. 100 acres.

Q. Tell us whether or not the 100 acres are planted in apples trees.

A. They are. There are about 80 acres of bearing trees and 20 non-bearing.

Q. How many tons of apples did you get from your ranch or orchard? By the way, is it referred

(Testimony of Paul A. Bondi.)

to as a ranch or an orchard? A. Orchard.

Q. How many tons of apples did you get from your orchard in 1954?

A. Just about 1,500 tons.

Q. Are you a member of any apple co-op?

A. Yes, I am.

Q. Which one or ones?

A. Sebastopol Apple Growers Union, and the Plant Hill Co-op Dryers.

Q. How long have you been a member of the Sebastopol Apple Growers Union? [2479]

A. Since 1943.

Q. How long have you been a member of the Pleasant Hill Co-op Dryers? A. Since 1950.

Q. Do you hold an office in either of those organizations? A. Yes, I do.

Q. What office do you hold in the Sebastopol Apple Growers Union?

A. I am Chairman of the Board.

Q. And for how long have you been Chairman of the Board? A. A little over two years.

Q. And what is the office that you hold in the Pleasant Hill Co-op Dryers? A. Secretary.

Q. How long have you been Secretary of that organization? A. A little over three years.

Q. In 1954, what did you do with the apples that were harvested from your orchard?

A. We delivered them to the Molino plant, those that were picked off the trees; those that were picked off the ground, why, we delivered them to the Pleasant Hill Co-op Dryer.

(Testimony of Paul A. Bondi.)

Q. You refer to the Molino plant? Your Sebastopol Apple Growers Union is also known as SAGU or Molino? A. Yes.

Q. What are the apples referred to that you pick off the [2480] ground and send to the Dryer?

A. Windfalls.

Q. During the 1954 season, did General Manager Elmo Martini have a discussion with you about the condition of the apples at SAGU?

A. Yes, he did.

Q. About when did he have this discussion?

A. About the middle of September.

Q. And where did it take place?

A. I was walking from the packing house towards the cannery——

Q. This is at Molino?

A. At Molino. He was walking from the cannery towards the office. He stopped and asked me if I had——

Q. Just a moment. Before the conversation began, let me ask you this: Who was present during the course of that conversation? A. No one.

Q. That is, no one other than you and Mr. Martini? A. Yes.

Q. Go ahead and tell us what was said.

A. He asked me if I had seen the apples that came out of the cold storage. They just started to run them that afternoon. I told him I had not. He said they were very bad, for me to go up and look at them.

Q. Wait a minute. Is that all the conversation?

(Testimony of Paul A. Bondi.)

A. At that time, yes.

Q. Did you go and take a look at the apples?

A. I did.

Q. Where did you go?

A. At the dumping station at the cannery where the apples were dumped at the grate.

Q. And you looked at the apples? A. I did.

Q. What did you see.

A. They were very badly bitter pitted, and there was quite a numerous amount of rot.

Q. Did you have another discussion with him after you looked at them? A. Yes.

Q. When did you have that?

A. A short time after.

Q. Wait a minute; the same day?

A. The same day.

Q. And where did that discussion take place?

A. It was in the office.

Q. In whose office?

A. In the Manager's office.

Q. And who was present?

A. Just Mr. Martini and myself.

Q. Will you please relate the conversation and identify who [2482] was speaking?

A. I told him that something would have to be done and have to be done immediately to save the apples that still could be used for processing.

Q. What did he say? A. He agreed.

Q. How did he agree?

A. He said, "Yes, that must be done."

Q. Was that all the conversation?

(Testimony of Paul A. Bondi.)

A. We talked of the Co-op cannery contacting them and having them process apples for us.

Q. Do you recall a Board meeting with the Board of Directors of SAGU held on October 12, 1954?

A. I do.

Q. Were you present?

A. Yes.

Q. Can you tell us as nearly as you can recollect who else was present at that meeting?

A. There was our Manager, Mr. McGuire.

Q. Wait a minute. Your Manager, Mr. McGuire?

A. Our Manager, Mr. Martini, Mr. McGuire, Mr. Hallberg, the late Frank Tragero, Bert Batten, Guerrazzi, Elma Hankins, Ivan Roberts, Joe Cor-doza, Ezra Briggs, Mr. Miller; that about covers them, I think.

Q. You said that Mr. Hallberg and the late Mr. Tragero were [2483] present?

A. Yes.

Q. Was either Mr. Hallberg or Mr. Tragero members of the Board of Directors?

A. No.

Q. When were regular meetings of the Board of Directors scheduled to be held?

A. The second Wednesday of each month.

Q. According to the calendar, October 12 was a Tuesday. Do you recall that meeting was held on Tuesday?

A. Yes, I do.

Q. Was there a regular meeting?

A. It was a regular meeting.

Q. Who called it?

A. I did.

Q. How did you call it, Mr. Bondi?

(Testimony of Paul A. Bondi.)

A. I asked the girl at the switchboard to contact the Board members.

Q. What did you tell her, as near as you recall?

A. I told her to tell the Board members that we were having the meeting one day previous because of Mr. Hallberg attending the meeting with Mr. Tragero.

Q. Was there any discussion at that meeting by Mr. Hallberg or Mr. Tragero?

A. Yes, there was. [2484]

Q. Will you tell us what was said?

A. Well, the purpose of Mr. Hallberg being there, and Mr. Tragero, they had come there about a week previous and stated they were going back East. They didn't know exactly what day, but they wanted to know if the Sebastopol Apple Growers Union would become members of a National Apple Institute, that an assessment would be made of five cents a green ton in order to promote apples. Mr. Hallberg, being President of the California Apple Council, was very much interested to get as many members as possible.

Q. Were there other matters discussed at that meeting besides this matter that Mr. Hallberg brought up? A. Yes, there was.

Q. Was there a discussion about the apples at that meeting? A. Yes.

Q. Will you tell us what was said and identify who is speaking, please?

A. Mr. Martini mentioned the shortage of warehouse space left. Then Dr. Winkler—

(Testimony of Paul A. Bondi.)

Q. What did Mr. Martini say, as near as you recall?

A. He said, "We are getting very limited on warehouse space. The applesauce is not moving out quite as fast as it should be in order to have enough warehouse space for the amount of applesauce being made, so something will have to be done." After some discussion, Dr. Winkler made a motion that we should [2485] go to one shift instead of two shifts.

He also said that the discretion should be up to our Manager, Mr. Martini, whenever he saw fit.

Q. Was there any opposition to that motion?

A. There was not.

Q. Did you preside at that meeting?

A. Yes, I did.

Q. In 1954 did SAGU have any insulated warehouses? A. Yes.

Q. How many? A. One.

Q. Where was that?

A. The north side of the cannery at Molino.

Q. Had you at any time during your services as Chairman of SAGU's Board had an experience with rusted cans containing SAGU's apple products?

* * * * *

Trial Examiner: The answer is either yes or no.

The Witness: Yes.

Q. (By Mr. Berke): When did you have that experience, Mr. Bondi? [2486] A. 1952.

Q. Where did you have the experience?

A. We saw some apples at No. 2 packing house.

(Testimony of Paul A. Bondi.)

Q. Where is that located?

A. It is located on McKinley Street in Sebastopol.

Q. Can you tell us——

A. Excuse me; McKinley and High.

Q. Can you tell us about the time of that?

A. I think it was in the month of October.

Q. Will you please tell us what that experience was?

A. I noticed that quite a number of cans had become rusty, evidently due——

Q. No. Where were the cans that you noticed in that condition?

A. The cans were in that warehouse, or the old packing house.

Q. Did you look at the cans?

A. Yes, I did.

Q. Did you notice their condition?

A. I did.

Q. Just tell us what you saw.

A. There was quite a number of cans that had become rusty.

Q. Was anything done about those cans?

A. Yes.

Q. Will you tell us what was done?

A. We got some men to clean off the rust.

Q. And then what happened to those cans?

A. They were salvaged; most of them were salvaged. Some were beyond salvaging, but most were salvaged.

(Testimony of Paul A. Bondi.)

Q. What did you do with those that were beyond salvage? A. They were dumped.

Q. Do you recall a meeting on October 15, 1954, held in the warehouse at SAGU of the employees?

A. Yes.

Q. Were you present at that meeting?

A. I was.

Q. Did you take part in it? A. Yes.

Q. Did you speak? A. I did.

Q. Did you speak from notes or did you speak without notes? A. I had notes.

Q. Do you have those notes now? A. No.

Q. Have you looked for those notes?

A. Yes, I did.

Q. Have you been able to find them?

A. No.

Q. How recently did you look for them?

A. About two weeks ago.

Q. Do you recall what you said at that meeting? [2488] A. Yes.

Q. Please tell us what you said, as near as you recall and using as near as you can the language that you used.

A. I told the employees that there was very little space left in the warehouse, that we were sorry that we had to lay a shift off; that there wasn't too many more apples to come in from the growers and there was not too many left in cold storage.

I also stated that in the past two seasons, at the end of the season, the employees were invited to

(Testimony of Paul A. Bondi.)

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I also stated that in the past two seasons, at the end of the season, the employees were invited to

(Testimony of Paul A. Bondi.)

a dinner by the employer, and that this year the same would be done. They were invited then.

Q. Is that all that you recall that you told them?

A. Yes.

Q. Were you the first to speak, or the last to speak, or what?

A. I am sure I was the second to speak.

Q. And did you remain after you spoke?

A. Yes, I did.

Q. Did any of the employees present complain to you that they were getting short notice?

A. No.

Q. Did you hear any of the employees while you were there complaining about getting short notice? A. I did not. [2489]

Q. Did any employees afterwards complain to you that they had got short notice?

A. No, they didn't.

* * * * *

Q. (By Mr. Berke): Do you know a man by the name of Bertolucci? A. Yes, I do.

Q. Did you have occasion to see him on or about February 5 or 6 at a tavern near SAGU?

A. Yes.

Q. What is Mr. Bertolucci's first name, do you know? A. I can't recall.

Q. If you heard it, do you think you would recognize it? A. I am sure.

Q. Angelo? A. That is right.

Q. Angelo Bertolucci testified here that on February 5 or 6 [2490] at a beer tavern across from

(Testimony of Paul A. Bondi.)

SAGU he met you and present also were Ziggy and John Gregori, and that there was discussion about a layoff in October, and that in the course of that discussion you said that a few on the Board of Directors were against the layoff because they had thousands of boxes in cold storage and they had already diverted quite a few elsewhere.

Was any such thing said in the conversation?

A. No.

Q. Do you recall having a conversation with Mr. Bertolucci on that occasion? A. I do.

Q. Who was present when you had this conversation?

A. There was Ziggy Gregori—excuse me; I misunderstood your question.

At the time there was Mr. Bertolucci and I.

Q. Were the Gregoris present in the conversation between Mr. Bertolucci and you?

A. Part time.

Q. Were they there at the beginning?

A. No.

Q. Will you tell us what the conversation was and identify who spoke?

A. We greeted each other, shook hands. He asked me how the pruning was getting along in the orchard. He then said, "Why don't you let the union come in?" I answered that [2491] I had nothing to do with that, nor the organization. It was entirely up to the employees.

He then said, "I hope everything that is said here will be confidential."

(Testimony of Paul A. Bondi.)

I answered that it didn't matter to me. He went on to say that he knew the plant in the Sebastopol area was not operating efficiently enough to be able to pay the top California cannery scale, and that if we did let the union in, they would not insist that those wages be paid immediately. There would probably be a 5 or 10 cents an hour raise from the present wages the first year; a little more the second year; and so on.

He said in no case would we ever think of closing down the plants because of wages being too high, so we wouldn't be able to pay them. He said we will be much better off if we would join, we would save money, attorney fees, time and also we wouldn't have to pay the people that were laid off just before the election.

He said, "The reason you people laid off that group was so you could win the election and you laid off just pro-union employees." I told him that he was absolutely wrong, that was not the case.

I then called William Gregori over. He came and I asked William, I said, "Bill, what was the reason that shift was laid off?" [2492]

He said there was a shortage of warehouse space.

Q. Was this in the presence of Mr. Bertolucci?

A. It was.

Q. Was there any further conversation?

A. Someone interrupted in a rather gruff voice talking with Mr. Bertolucci.

Q. Who was that, do you know?

(Testimony of Paul A. Bondi.)

A. I don't know. I walked away and I didn't hear the rest of the conversation.

Q. Was John Gregori in that tavern that night in your company and Mr. Bertolucci's company?

A. No.

Q. You mentioned William Gregori.

A. Yes.

Q. Was there any other Gregori there that night besides William?

A. His brother, Ziggie. [2493]

* * * * *

Q. (By Mr. Berke): Mr. Bondi, do you know Mrs. Orice Storey? A. I do.

Q. Was she an employee at SAGU last year?

A. She was.

Q. And did she work there in previous years, or in 1953 did she, to your knowledge?

A. I think she did.

Q. Mrs. Storey testified here that in the latter part of 1953 she saw you put a mouse in a can and put it on the trim belt, and that the girls screamed and you came back into the cannery laughing. Did such an occurrence take place?

A. Absolutely not.

Q. Did it take place at any time during the 1953 season?

A. Not as far as I was concerned, no.

Q. Do you know Clarence Storey? A. I do.

Q. Was he an employee at SAGU in 1954?

A. Yes. [2494]

Q. He testified in this hearing that about Aug-

(Testimony of Paul A. Bondi.)

ust 15, 1954, you put a live mouse in a can and dumped it into the flume with apples, and that there was screaming in the cannery. Did you do such a thing? A. No, I never.

Q. Whether on that date or any time during the 1954 season? A. Correct.

Q. Was there an instance about that time involving a live mouse? A. Yes.

Q. Did you see the incident?

A. I was there.

Q. Will you please tell us what occurred?

A. I was where the apples were being dumped, watching the apples come over the grader, and as the box of apples was dumped, a mouse ran out.

A young man rushed after it and caught it by the tail, walked towards the women on the belt in the pick-out belt, and one screamed. I asked him to come back. I said, "Don't do that. Somebody can easily get hurt."

He came towards me and I said, "Get rid of it." He put it in a can.

Q. Did you have anything to do with that can?

A. No.

Q. Did you see what happened to the can and mouse after that? [2495]

A. I did not.

Q. Do you know who the young man was?

A. His last name is Reynolds.

Q. Do you know a woman by the name of Mrs. Tripp?

(Testimony of Paul A. Bondi.)

A. I don't think so; I may know her if I see her.

Q. You don't recall the name?

A. No, I don't.

Q. Mrs. Tripp testified in this hearing that three weeks before October 15, Elmo Martini, you and some other man whom he did not identify, were present near Clarence Storey, and that Elmo Martini, on that occasion, said he knew his biggest trouble maker with the union was and he pointed in the direction of Clarence Storey.

Did such an incident take place in your presence? A. No.

Q. Did you ever hear of Elmo Martini making reference to Clarence Storey as his biggest trouble maker with the union? A. No.

Q. Mrs. Tripp further testified that at the October 15 meeting in the warehouse of the employees you said that all would be invited to dinner at the close of the season, and those on the list were to remain and the others were discharged, and that the employees could turn in their receipts for their caps and aprons and get their money back.

Did you say those things? [2496]

A. I did not.

Q. Have you related to us as near as you recall in the language you used what you did say?

A. I have.

Q. Did you say that those in the list were to remain and others were discharged? Did you make any reference to that? A. No.

(Testimony of Paul A. Bondi.)

Q. Did you say that the employees could turn in their receipts for their caps and aprons and get their money back? A. No.

Q. Do you know a young lady by the name of Gloria Pate? A. No.

Q. Gloria Pate testified in this hearing that at the October 15 meeting in the warehouse you said you hoped everybody would come back next year.

Did you make such a statement in the course of your remarks? A. No, I didn't.

Q. Clarence Storey testified that on September 29, 1954, about 11:45 a.m., Elmo Martini came out of the south door in the cannery and called Clarence Storey over out into the street on company property and asked him, "Do you know what your wife is doing? She is forming a committee on the night shift. You go out and fire her."

Clarence Storey further testified that he said, "That is your fucking job. If you want to fire her, you go fire [2497] her. I only work here. You are the boss."

Then Clarence Storey further testified that on that occasion Leonard Duckworth said he had two witnesses to prove she was forming a committee, two girls, and then you, Bondi, came around the truck and said, "If you have two witnesses, that is enough. I will sign her check."

Did any such incident take place?

A. Not to my knowledge.

Q. Did you ever make a statement that "If you

(Testimony of Paul A. Bondi.)

have two witnesses, that is enough. I will sign her check"? A. No.

Q. Did you sign Mrs. Storey's checks?

A. Yes, I did.

Q. Where did you sign it?

A. Signed it in the office?

Q. Do you know when it was that you signed it?

A. You mean what time of the day?

Q. The day, if you know it, with relation to the time of her discharge, which was September 25.

A. Leonard Duckworth asked me if I would sign a check.

Q. No; where was Leonard Duckworth when he asked you that? A. In the office.

Q. Which office?

A. In the regular office where the bookkeepers are working. And the switch board operator.

Q. Is that the building where Mr. Martini has his office? A. Yes.

Q. Was Clarence Storey present at that time?

A. No.

Q. Again referring to September 25, at about noontime, Clarence Storey says that on the occasion I have just told you he testified about, that he told Mr. Martini that his wife was on her own time and that Martini said, "Why don't they get their fucking committee and get it over with."

Martini further said, "I am the boss. Why in hell don't you get Bertolucci and Rhodes to shut the goddamn thing down. If you don't I am going

(Testimony of Paul A. Bondi.)

to," and that Martini further said he forbids talking about the union on company property.

Did you hear any such conversation?

A. No.

Q. Did any such conversation take place in your presence? A. No.

Mr. Berke: You may cross examine. [2499]

Cross Examination * * * * *

Q. (By Mr. Karasick): Who spoke before you did at the meeting at the warehouse on October 15?

A. Mr. Martini.

Q. What did he say? A. I don't know.

Q. You were there when he spoke, were you not?

A. Well, I wasn't in hearing distance. I was behind.

Q. Behind whom?

A. I was in the rear of him. I wasn't near him.

Q. How far were you from him?

A. About from here to the wall (indicating).

Trial Examiner: About 15 feet?

Mr. Karasick: I will so stipulate.

Q. (By Mr. Karasick): You were standing back of him about 15 feet?

A. It was probably 20 feet.

Q. 20 feet in back of him? You and he were facing the employees?

A. I don't recall. Maybe if I heard the conversation over again I would.

(Testimony of Paul A. Bondi.)

Q. That may be, but I am asking you if you recall from your own recollection?

A. Give me some time.

Q. Take all the time you want.

Mr. Berke: Mr. Karasick is clocking you, Mr. Bondi, but take your time anyway.

The Witness: I remember something, yes. He told them of the shortage of space in the warehouse, that one shift would be laid off.

Q. (By Mr. Karasick): Did he say which shift would be laid [2511] off?

A. I don't recall that, no.

Q. What else did he say?

A. He said that as much as possible the people would be laid off according to seniority. [2512]

* * * * *

Q. And that canning was done on a basis of the co-op charging SAGU a flat fee per case based on co-op's estimated cost plus a margin for their service; is that right? A. Yes. [2533]

* * * * *

Q. Did you talk to Mr. Briggs, or did he talk to you once or more than once during 1954 about this?

A. I recall this one time we talked about it.

Q. About the time that you had this conversation with Mr. Martini you have related?

A. No; this was previous.

Q. How much previous? A. Say a week.

Q. About the first week of September?

A. Yes.

(Testimony of Paul A. Bondi.)

Q. Was anyone else present?

A. Not that I recall.

Q. Just the two of you? A. Yes.

Q. Would you tell us what the conversation, in substance, was? [2535]

A. The conversation was that if we were going to have too many apples here at this plant, we should know at the Co-op cannery so we can figure on processing for you. [2536]

* * * * *

Q. One more thing, Mr. Bondi. You mentioned that there was a shortage of warehouse space which was discussed at the Board of Directors' meeting on October 12, 1954; is that right? A. Yes.

Q. How much space was left at that time in the warehouse?

A. I would say 15 to 20 thousand cases.

Q. 15 or 20 thousand cases? There was room for 15 or 20 thousand cases, is that what you are saying?

A. I don't recall if there was any specific number of the amount of cases. By looking at the warehouse myself, I would say 15 or 20 thousand.

Q. That there was still room for, but that was all? A. Yes.

Q. Is that what you are saying? A. Yes.

Q. This is in which warehouse?

A. In the new one.

Q. What about the cannery warehouse?

A. As I remember, it was full. [2540]

* * * * *

(Testimony of Paul A. Bondi.)

Recross Examination * * * * *

Q. (By Mr. Karasick): You wipe them before they go into cold storage?

A. The culls are all wiped. They go through the packing house first.

Q. Why do you wipe them when you put them in cold storage?

A. We have no alternative after they go through the packing house. The better ones are taken out, which can be shipped, and the others are put in cold storage, and they are all wiped at the same time.

Q. Why can't they just wipe the apples they are going to pick out for fresh fruit shipment and not go through the burden [2543] of wiping the other apples that are put in cold storage?

A. They are dumped; they go over a small eliminator, then through a wiper, and then a grader where the women pick out the imperfect apples, but they are all wiped at that time.

Q. Is there any reason why the grader can't come before the wiper?

Mr. Berke: Just a moment.

The Witness: I never thought of that.

Trial Examiner: Sustained.

Mr. Berke: This is going far afield.

Mr. Karasick: I think this goes to the issue.

Trial Examiner: The question is how it was done.

Mr. Berke: What Counsel is trying to do is get this company to change its operations.

(Testimony of Paul A. Bondi.)

The Witness: Maybe that would be all right, I don't know.

Q. (By Mr. Karasick): Now that I have called that to your attention, does that seem a good idea?
* * * * * [2544]

Recross Examination * * * * *

Q. (By Mr. Karasick): I believe you said that bruised apples can't be kept as long in cold storage as apples that are not bruised. Can [2557] you give me an estimate as to how long unbruised apples could be kept in cold storage under the conditions that you have at SAGU?

A. Culls or otherwise?

Q. Culls, not bruised.

A. A cull will last a long time in cold storage if not bruised.

Q. In a matter of months?

A. Oh; if they are matured, I would say two months, on Gravensteins.

Q. And if they are bruised?

A. If they are bruised, they don't keep as long.

Q. Two months? A. Probably a month.

Q. Do you know how long apples in cold storage in 1954 had been there at the time when you discussed sending them to the Co-op?

A. They were put in about the 20th of July.

Q. Where did the apples come to that were sent to the Co-op for canning in 8-ounce cans the first time when you had them on the first job? Did they come from cold storage? A. No.

Q. Where did those apples come from?

(Testimony of Paul A. Bondi.)

A. They came directly from the plant, as excess apples that you couldn't use that were not cold storage. [2558]

Q. So from the time that you started operations in July apples were going into cold storage?

A. Yes.

Q. Do you know whether or not there was any effort made to have the first apples in the cold storage put in an accessible place so they could be first removed?

A. That is done.

Q. Do you know how long they continued to put in cold storage after July 20?

A. Until about the 1st of September or the latter part of August. [2559]

* * * * *

ERROL DAVID WILSON

a witness called by and on behalf of the Respondents, being first duly sworn, was examined and testified as follows:

* * * * *

Direct Examination

Q. (By Mr. Berke): What is your occupation, Mr. Wilson?

A. I am the accountant for the Sebastopol Apple Growers Union.

* * * * *

A. As Office Manager and Accountant.

Q. Do you have people working under your supervision at SAGU? [2570]

A. I do.

Q. Did you in 1954?

A. Did I have people under me?

(Testimony of Errol David Wilson.)

Q. Yes. A. Yes.

Q. How many people worked under you in 1954?

A. Seven. [2571]

* * * * *

Q. (By Mr. Berke): Do you have the payroll records for an employee by the name of Susie Coats? A. I have.

* * * * *

Q. (By Mr. Berke): Mr. Wilson, you have the two documents pertaining to Susie Coats. Will you tell us what the larger of the two documents is?

A. That is the employee's personnel payroll record.

Q. And what is the smaller document that appears to be a card?

A. That is the weekly time card.

Q. And where is the information taken from that appears on the larger document, the payroll record? A. It is taken from the time card.

Q. And the information that appears on the time card, where does that come from?

Trial Examiner: You mean the one he has in his hand?

Q. (By Mr. Berke): The small one, yes.

A. Those cards are in racks in the cannery. Each one has his own number and it is punched in the time clock.

Q. Was the larger sheet—what did you call it?

A. Personnel payroll record.

Q. The personnel payroll record? Can we refer to it as "payroll record" for short?

(Testimony of Errol David Wilson.)

A. Payroll record.

Q. Was that made by you or under your supervision and direction?

A. Made under my supervision.

Q. And is that an original personnel payroll record of that particular employee, Susie Coats?

A. Yes.

Q. Does that contain information showing when she first was employed by the company?

A. Yes.

Q. And does it contain information as to when her employment ended?

Mr. Karasick: At this point may I ask, limit it to the foundation with respect to the document, without getting into the document itself.

Trial Examiner: The question is merely whether the document shows that information, not what the information is.

Mr. Karasick: All right.

Trial Examiner: He may answer.

The Witness: Yes.

Q. (By Mr. Berke): Will you tell us what it shows as to when Susie Coats was first employed by the company? [2619]

A. September 28. [2620]

* * * * *

Q. (By Mr. Berke): Mr. Wilson, showing you the time card of Susie Coats that you testified about, is it correct that it shows that card is for the pay period ending October 16, 1954? [2625]

A. It does.

(Testimony of Errol David Wilson.)

Q. And is it correct that it only contains—will you tell us what it shows with respect to that pay period as to the date when Miss Coats or Mrs. Coats last worked during that pay period?

A. The card indicates that she worked on Tuesday, October 12. She punched in at 3:53 p.m. She punched in again at 9:54 p.m. and punched out at the close of the shift on Wednesday, 1:05 a.m.

I might explain the reason for only having three time clock punches. We only have a half hour for a meal. And if all of them are required to punch both in and out in that half hour, a big portion of their time would be taken punching the clock and they would be delayed. We were assured by both the Wage and Hours and the State Welfare that it was permissible that they wouldn't have to punch out and they would punch in at their mealtime.

Q. So that the second column, where it is punched in, represents, as I understand your testimony, the time sheet punched in after her lunch period? A. Yes.

Q. How many hours did she work that week? Is that indicated on the card?

A. Eight hours. [2626]

* * * * *

Q. (By Mr. Berke): Mr. Wilson, I think there is a pending question, but I will ask you, does there appear on this payroll record of Susie Coats any of the information that appears on the time card?

A. The week ending the period and the number of hours worked for the week.

(Testimony of Errol David Wilson.)

Q. Will you state what it is as you go along?

A. The week ending October 16, eight hours.

Q. Is that the total number of hours that she worked during that pay period, according to this payroll record? A. It is.

Q. And does it show the amount of pay that she received?

A. It shows the gross amount of pay. [2627]

Q. How much is that? A. \$8.

Q. And does it show whether a check was mailed to her?

A. It indicates that a check was mailed.

Q. Is it correct that the time card has in pencil on it the word "quit"? A. It has.

Q. Does "quit" appear on the payroll record of Susie Coats that you hold in your hand?

A. There is a notation "quit, 10-12-54."

Q. Does the payroll record show the date when she was employed by the company?

A. It shows, "employed, 9-28-54."

Q. The record also shows in ink—that is the payroll record—that after the words "date terminated, 10-15"; is that correct? A. Yes.

Q. Can you explain that with reference to what you have just read after the words, "reason: quit, 10-12-54"?

A. As I said before, our practice there, when an employee failed to report for work after a day or two, or three days, they were considered as terminated. [2628]

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(Testimony of Errol David Wilson.)

Q. Do you have a payroll record with you, Mr. Wilson, for Edna McCarl? A. I have.

Q. You have handed me what purports to be a time card and a personnel payroll, or two time cards, I should say, and a personnel payroll record for Edna McCarl, have you? A. I have.

Q. Were those taken from the personnel payroll records of the company? A. They were.

Q. And were those records made and kept in the same manner as you have described the making of the personnel payroll record and time card of Susie Coats? A. They were.

Q. And were those made under your direction and supervision? A. They were.

Q. And were these records kept under your custody and control at the Sebastopol Apple Growers Union? A. They were. [2629]

Q. One of these time cards is for the pay period ending October 9, 1954, is it not? A. Right.

Q. Will you tell us what it shows with respect to the last date worked during that pay period?

A. It indicated she worked on Friday. There is a stamp over there that indicates she came to work at 6:48 a.m. and checked out at 11:42 a.m.

Q. And does it show the number of hours that she worked during that week ending October 9, 1954? A. 21 and three-quarters.

Q. Is some of the information that appears on the time card I have just asked you about on the payroll record of Edna McCarl?

(Testimony of Errol David Wilson.)

A. The week ending October 9 is indicated and the number of hours, $21\frac{3}{4}$.

Q. And is the amount she was paid for that period also indicated? A. It is.

Q. And what does that show? A. \$20.66.

Q. Does it show that she was paid that amount for that period?

A. She was paid that amount, less the Social Security and Income Tax withholdings, in the amount of \$18.64. [2630]

Q. And does it show she was paid by check?

A. Check No. 131.

Q. I show you a second time card in the name of Edna McCarl for the pay period ending 10-23-54. That card delivery for the period—first, what is 7-101?

A. That is the accounting number for the work she was doing.

Q. The second card for the pay period ending October 23, 1954 is different than the first card and has information at the top in pencil; is that right?

A. That is right.

Q. Is there some reason for that, to your knowledge, Mr. Wilson?

A. Yes; it is a customary practice to type up the cards on a Friday or Saturday for those we expect to return to work on Monday. When they first come to work they report in and usually the floor lady or somebody in the plant just writes their name in pencil for that first week, showing the week ending pay period, and their name.

(Testimony of Errol David Wilson.)

Q. Did you search the company records for time cards between those two pay periods, October 9 and October 23? A. I did.

Q. And did you find any for Edna McCarl?

A. I did not.

Q. Does this second card for the pay period ending October [2631] 23, 1954, contain entries as to days and hours worked? A. It does.

Q. And what does it show as to the last day she worked during that period?

A. She worked on Saturday, October 23.

Q. How many hours does that time card show she worked for that period? A. 48 hours.

Q. Is the information on that time card on the payroll record of Edna McCarl?

A. The individual personnel records show she worked the week ending October 23, for eight hours.

Q. Does it show how much she was paid for that period? A. \$48.

Q. Was she sent a check in that amount?

A. She probably picked it up. I don't think it was sent to her.

Q. Was she given a check?

A. Yes; for \$42.46.

Q. Is the check number indicated on there?

A. 599.

Q. I notice on this payroll record that column No. 3—that is between the period ending October 9 and the period ending October 23—is blank. Can you explain that, Mr. Wilson? [2632]

(Testimony of Errol David Wilson.)

A. Yes. In the payboard system, the week ending should be the same on every page. In other words, this page, October 2, is line No. 1, and all corresponding employees would be for that same period, the week ending October 2, on line No. 1.

The second line is a week ending October 9, the third line on other employees who work would be the week ending October 16, and so on down. This indicates that she did not work that week.

Q. Does the payroll record show that she worked beyond the week ending October 23, 1954?

A. It does.

Q. What was the last entry on that payroll record? A. The week ending November 6.

Q. And does it show how many hours she worked that week? A. 40 hours.

Q. And does it show how much she was paid?

A. \$40 was her earnings, and she was given check No. 1,000 in the amount of \$36.10. [2633]

* * * * *

Q. (By Mr. Berke): Do you have the payroll record for Julia Row?

Mr. Wilson, going back for a moment to the payroll record of Edna McCarl, does that show the date her employment terminated?

A. It does not show the final date terminated. We consider she failed to show up, or report for work is better, and we considered her as terminated on October 8.

Mr. Karasick: Just a moment, Mr. Examiner.

(Testimony of Errol David Wilson.)

I move to strike the witness' testimony, "we considered" and so forth.

Trial Examiner: All right; granted.

Q. (By Mr. Berke): Just answer my question: Does this document show the date her employment terminated? A. Yes.

Q. What date does it show?

A. October 8.

Q. What year? A. 1954.

Q. Does it give the reason? A. Quit.

Q. Mr. Wilson, you have handed me two time cards and a [2634] payroll record with respect to Julia Row, also known as Julia Ann Row; is that correct? A. Correct.

Q. One of these time cards is for the pay period ending October 9, 1954; is that right?

A. Right.

Q. And what does it show with respect to the last day she worked during that pay period?

A. Showed she worked Wednesday, October 6.

Q. Will you read what the entry is?

A. She punched in, reported for work at 3:54 p.m., the afternoon of Wednesday. She reported back from her meal period at 8:28 p.m. Wednesday, and checked out at the end of the day at 12:32 a.m., Thursday. She worked eight hours.

Q. That day? A. That day.

Q. How many hours all together, according to that card, did she work during that pay period?

A. Sixteen hours.

Q. Looking at the payroll record, are some of

(Testimony of Errol David Wilson.)

the entries on this card on the payroll record of Julia Row?

A. Yes; the payroll record indicates she worked the week ending October 9, 16 hours.

Q. How much was she paid; does that show?

A. \$16. She was given check No. 187 in the amount of \$14.82. [2635]

* * * * *

Q. (By Mr. Berke): Well, looking at the next time card, that is for the pay period ending October 30, 1954, is it not? A. Yes.

Q. That at the top has entries in pencil, doesn't it? A. Yes.

Q. Can you tell us why that is?

Q. As explained before, the payroll cards for the employees we feel will be back Monday are made up on a Friday or Saturday, and they are typed. In this case there was no card typed up, and when she reported for work, whoever put her on, the cannery wrote that up in longhand. [2636]

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Q. (By Mr. Berke): What you are telling us is the practice that was followed at SAGU in those instances? A. It is the practice.

Q. What does the card for the pay period ending October 30, 1954, show as to when Julia Ann Row last worked during that period?

A. Thursday, October 28.

Q. Will you tell us what the entries are for that day on that time card?

A. She reported in at 7:49 a.m. on Thursday.

(Testimony of Errol David Wilson.)

She returned from her lunch period at 12:54 p.m., checked out her time card at 5:02 p.m.

Q. How many hours did she work that day?

A. Eight hours.

Q. How many hours did she work according to the card during that pay period?

A. Sixteen hours.

Q. Is the information that is on this card, or some of the information on that card on the payroll record of Julia Row?

A. The payroll record shows that she worked the week ending October 30, 16 hours.

Q. And does it show how much she was paid?

A. It shows she was paid \$16.

Q. Did she actually receive a check? Does it show in that amount?

A. Check No. 853 was written in the amount of \$14.82. [2638]

* * * * *

Q. (By Mr. Berke): Did you search to see if there was a time card for Julia Ann Row between the pay period ending October 9 and the one ending October 30, 1954? A. I did.

Q. Did you find any? A. No.

Q. Did Julia Ann Row work beyond the pay period, beyond October 30, according to the payroll records you have in your hand? A. She did.

Q. What is the last entry with respect to when she worked?

A. The week ending December 11, 1954, she worked 36 hours.

(Testimony of Errol David Wilson.)

Q. And how much does that show she was paid?

A. \$36 gross pay, check No. 1750 was issued in the amount of \$30.62.

Q. Can you explain the difference between the \$36 gross pay and \$30.62?

A. Deductions were made as follows: the Federal Old Age Annuity, \$.72; State Unemployment Insurance, \$.36; Income Tax Withheld, \$4.30.

* * * * *

Q. Do you have a payroll record with respect to Stella Vessels? A. I do.

Q. Mr. Wilson, you handed me two time cards and a payroll record for Stella Vessels, have you not? A. I have.

Q. Where were those taken from?

A. From the payroll records in the office of SAGU. [2640]

Q. And were the entries that were made on those documents made in the same manner that you have described the entries for Susie Coats' records?

A. They were.

Q. And were they made under your direction and supervision? A. They were.

Q. And have you had custody and control of these records?

A. They have been maintained in the office, yes.

Q. Under your personal supervision?

A. Yes.

Q. I show you a time card for the pay period

(Testimony of Errol David Wilson.)

ending October 16, 1954. Will you tell us what the last entry on that time card shows?

A. It shows that she punched in the morning of Wednesday, October 13, at 6:53 a.m. She returned from her lunch period at 11:54 a.m. She punched out—she didn't punch out, but it is in pencil indicating that she left at 12:00 noon that day.

* * * * *

Q. (By Mr. Berke): How many hours does it show she worked that day? [2641]

A. Five hours.

Q. Over in the far left-hand column appears in pencil something that looks like initials; is that correct? A. Correct.

Q. Do you know whose initials those are?

A. No, I don't.

Q. Do you know why the time appears in pencil, 12:00 o'clock as indicated on that card?

A. The 12:00 was punched incorrectly under the "In" column, and they carried it over to the "Out" column.

Q. I see. There is 12:00 punched with "W", and a line has been drawn through it in the "In" column; is that correct? A. Yes.

Q. And in that same column appears "W-11:54"; is that correct? A. Yes.

Q. Has that happened on other occasions where the time would be punched in an incorrect column and the correct time would be written in pencil?

A. It has.

(Testimony of Errol David Wilson.)

Q. How many hours does the card show she worked that week? A. 21 hours.

Q. Would you look at the payroll record and tell us whether some of the entries on the card I have just interrogated you about appear on the payroll record for Stella Vessels? [2642]

A. The payroll record for Stella Vessels shows she worked the week ending October 16, 21 hours. Her gross pay was \$19.95; check No. 298 was issued in the amount of \$15.85, with a notation that the check was mailed.

Q. By the way, does that payroll record show the date when Stella Vessels was employed?

A. It shows she was employed September 17.
* * * * *

Q. What does this time card show with respect to when Stella Vessels last worked during that pay period of October 23, 1954?

A. It showed she worked October 23, Saturday.

Q. Will you read the entries as to that date?

A. She reported in for work, on the time clock, at 7:50 a.m. on Saturday. She reported back from her lunch period at 12:51 p.m.; checked out on the time clock at 5:01 p.m., and worked eight hours.

Q. What does it show with respect to the total number of hours she worked for that pay period?

A. 40 hours.

Q. Looking at the payroll record of Stella Vessels, do some of the entries that appear on this particular time card appear on the payroll record?

A. Yes.

(Testimony of Errol David Wilson.)

Trial Examiner: This particular card we are referring to shows week ending what?

Mr. Berke: The 23rd. I have identified [2645] that in the previous question.

Q. (By Mr. Berke): Go ahead.

A. It shows that she worked the week ending October 23, 40 hours.

Q. Does it show how much she was paid?

A. It shows that her gross earnings were \$40, and check No. 642 was issued in the amount of \$31.50.

Q. Does it show that she worked after that particular period of October 23, 1954?

A. It does.

Q. What is the last pay period entry on that particular payroll record?

A. The week ending December 11, 1954.

Q. Does it show how many hours she worked?

A. 43 hours.

Q. Does it show the amount she was paid?

A. Her gross earnings were \$43, and check No. 1763 was issued in the amount of \$33.91.

Q. Have you the payroll record of Edith Wasin?

A. Yes.

Q. Mr. Wilson, you handed me two time cards and a payroll record in the name of Edith Wasin; is that correct? A. Correct.

Q. Where did those come from?

A. From the accounting records and payroll records in the [2646] office of Sagu.

Q. And were those made in the manner that you

(Testimony of Errol David Wilson.)

previously described, the other payroll records and time cards? A. They were.

Q. And were those made under your direction and supervision? A. They were.

Q. And were they kept at the company under your custody and control? A. They were.

Q. And will you look at the time card for the pay period ending October 16, 1954? I have handed you such a card, have I not? A. Yes.

Q. How many entries appear on that card for that week?

A. Including the hours worked, three.

Q. I mean how many entries by day?

A. One.

Q. Will you tell us what it shows as to the date and the entries as to that particular date?

A. It shows she worked October 11, on Monday, written in in red, 6:57 a.m.

Q. Under what column?

A. Under the "In" column, in the morning, initials "A.U." No other punches except the out punch at 4:05 p.m.

Q. And how many hours does it show? [2647]

A. Eight hours.

Q. Can you tell us why the in column, the first in column is in red pencil? A. I can't.

Q. To your knowledge, have there been other time cards of other employees where the entry as to the time punched in for commencing work was not actually punched by the time clock, but an entry either in pencil or pen was made?

(Testimony of Errol David Wilson.)

Trial Examiner: This particular card we are referring to shows week ending what?

Mr. Berke: The 23rd. I have identified [2645] that in the previous question.

Q. (By Mr. Berke): Go ahead.

A. It shows that she worked the week ending October 23, 40 hours.

Q. Does it show how much she was paid?

A. It shows that her gross earnings were \$40, and check No. 642 was issued in the amount of \$31.50.

Q. Does it show that she worked after that particular period of October 23, 1954?

A. It does.

Q. What is the last pay period entry on that particular payroll record?

A. The week ending December 11, 1954.

Q. Does it show how many hours she worked?

A. 43 hours.

Q. Does it show the amount she was paid?

A. Her gross earnings were \$43, and check No. 1763 was issued in the amount of \$33.91.

Q. Have you the payroll record of Edith Wasin?

A. Yes.

Q. Mr. Wilson, you handed me two time cards and a payroll record in the name of Edith Wasin; is that correct? A. Correct.

Q. Where did those come from?

A. From the accounting records and payroll records in the [2646] office of Sagu.

Q. And were those made in the manner that you

(Testimony of Errol David Wilson.)

previously described, the other payroll records and time cards? A. They were.

Q. And were those made under your direction and supervision? A. They were.

Q. And were they kept at the company under your custody and control? A. They were.

Q. And will you look at the time card for the pay period ending October 16, 1954? I have handed you such a card, have I not? A. Yes.

Q. How many entries appear on that card for that week?

A. Including the hours worked, three.

Q. I mean how many entries by day?

A. One.

Q. Will you tell us what it shows as to the date and the entries as to that particular date?

A. It shows she worked October 11, on Monday, written in in red, 6:57 a.m.

Q. Under what column?

A. Under the "In" column, in the morning, initials "A.U." No other punches except the out punch at 4:05 p.m.

Q. And how many hours does it show? [2647]

A. Eight hours.

Q. Can you tell us why the in column, the first in column is in red pencil? A. I can't.

Q. To your knowledge, have there been other time cards of other employees where the entry as to the time punched in for commencing work was not actually punched by the time clock, but an entry either in pencil or pen was made?

(Testimony of Errol David Wilson.)

work, or what was the last pay period that she worked?

A. The week ending December 11, 1954.

Q. And how much was she paid?

A. She worked 43 hours; her gross earnings were \$43 and check No. 1764 in the amount of \$40.81 was issued. [2654]

* * * * *

Q. (By Mr. Berke): Do you have the payroll record with you, Mr. Wilson, for Ruth Albertoni?

A. I have.

Q. You have handed me, with respect to Ruth Albertoni, a personal, personnel payroll record and time card for the pay period ending October 2, 1954, have you? A. I did.

Q. The time card shows at the top, in addition to the printed and typewritten information in ink, does it not, 9-27, and below that, "quit"?

A. It does.

Q. During that pay period, is there an entry for more than one day on that card?

A. There is not.

Q. What is the entry that appears thereon, will you tell us what day?

A. September 27, Monday.

Q. Go ahead and describe it.

A. "Reported in for work". It is written in pencil, "4:00 p.m.," initialed "H".

Q. In the left-hand column? [2659]

A. Yes.

Q. What else?

(Testimony of Errol David Wilson.)

A. Checked back from meal period at 8:14 p.m.

Q. Is that the time clock punch?

A. That is the time clock punch, and time clock punch completion of shift on Tuesday, at 12:33 a.m.; worked eight hours.

Q. How many hours were worked all that week, according to that time card?

A. Eight hours.

Q. Is some of the information that appears on that time card on the payroll record of Ruth Albertoni?

A. The personnel payroll record shows that she worked eight hours for the week ending October 2.

Q. And does it show how much she was paid?

A. She was paid \$8 gross pay, check No. 11068, in the amount of \$6.32, with the notation "mailed October 8".

Q. Are there any entries on the personnel payroll record after the period ending October 2, 1954?

A. With the exception of the totals of the quarter and the total for the year, there are none.

Q. Does the payroll record indicate the date when Ruth Albertoni was employed?

A. It does not.

Q. Does it indicate the date when her employment terminated? [2660]

A. September 27.

Q. Is the reason given? A. "Quit".

Q. Is this time card, to your knowledge, the last time card for Ruth Albertoni, in your records?

A. To the best of my knowledge it is, yes.

* * * * * [2661]

(Testimony of Errol David Wilson.)

Q. (By Mr. Berke): Mr. Wilson, when we recessed last evening, I think the last person I had asked about that time was about Ruth Albertoni. You are going to search the Company's records to see if you had any time cards after October 2. Did you do so? A. Yes.

Q. Did you make that search?

A. I searched last night. I could find no other record. [2666]

* * * * *

Q. (By Mr. Berke): Do you have the time card for the payroll period ending November 6 of Edna McCarl? A. I have.

Q. Now you previously testified with respect to Miss or Mrs. McCarl's payroll record and you previously testified with respect to what the time cards for the payroll period ending October 9 showed which I understand was—or strike “which I understand”—and also with respect to the time card for the 23rd, and as I recall it you also testified that there were no time cards between those two dates, is that correct?

A. To the best of my recollection, it is.

Q. I mean, you searched the record?

A. I searched the record. There is no other card.

Q. And that the payroll record shows no entries alongside Column 3 between the payroll period ending October 9 and the payroll period ending October 23; is that correct? A. It does, yes.

Q. Now the card you produced here this morn-

(Testimony of Errol David Wilson.)

ing is for the payroll period ending November 6, 1954; is that correct? A. Right.

Q. And will you tell us the date and the last entry with respect to that card?

A. Last entry is Saturday, November 6, shows that, the time [2668] clock punch in at 7:54 a.m., punch back returning from meal period at 12:27 p.m., punched out, end of shift evidently, or punched out at end of shift 4:32 p.m., worked eight hours that day.

Q. Now down at the bottom in the "Out" column, and below the heavy line which ends at "Week," appears to have been punched in "TU 431," then a pencil line drawn through that?

A. "TU" stands for Thursday—I mean Tuesday, correction, please—Tuesday, with a line would be p.m., 4:31.

If I might explain what happens once in a while on the time clock that we had there during that year: The card is inserted and there is a little lever that is pushed to punch the time. If the girl, or whoever is punching, holds this card in their hand it won't go all the way down and it might punch on the wrong line.

This indicates, in a case of that kind, the practice would be for the floor lady to scratch it out and they either re-punch or they O.K. the correct time.

Q. Now, how many hours did she work that last day, that Saturday?

A. Forty hours—Oh, the last one day, eight hours.

(Testimony of Errol David Wilson.)

Q. And how many hours does the card indicate she worked that week? A. Forty hours.

Q. Now some of that information that appears on that time card, does that show up on the payroll record of Edna McCarl that you have in your hand?

A. It does. The personnel record shows the week ending November 6, forty hours.

Q. Does it show how much she was paid for that week?

A. Gross pay, \$40.00; check No. 1000, in the amount of \$36.10, was issued for the net amount due.

Trial Examiner: Does it show the shift she is on?

Mr. Berke: Well that particular card doesn't. One of the cards shows she was on the day shift, the one ending October 9. I think it is pretty clear after October 15 they had only one shift.

Mr. Karasick: May I see this, please, again?

Trial Examiner: I don't know whether this is clear on the record from previous examination or not, but apparently the dollar rate that had been prevalent on the night shift continued for the day shift after October 15. Is that right?

All right, will you answer that, Mr. Wilson?

The Witness: Yes.

Q. (By Mr. Berke): Does this payroll record show the date when she was first employed?

A. No.

Q. Does it show the date when she was terminated? A. Yes. [2670]

(Testimony of Errol David Wilson.)

Q. What is the date on there?

A. October 8, 1954.

Q. And does it give the reason? A. Quit.

Mr. Karasick: Pardon me; which employee is this?

Mr. Berke: Edna McCarl.

Q. (By Mr. Berke): Now what is the first entry on the personnel payroll record that you have for Edna McCarl?

A. Week ending September 11, thirty-seven hours.

Q. And does it show the amount she was paid at that time?

A. Gross pay, \$35.15; check No. 10457 in the amount of \$28.30.

* * * * *

Q. (By Mr. Berke): Mr. Wilson, do you have a payroll record there for a Marie Scheffler, S-c-h-e-f-f-l-e-r? [2671] A. I have.

Mr. Karasick: Unless I am mistaken, my notes show there is no dispute on that employee.

Mr. Berke: There is no dispute. I am going to go into it for another purpose.

Mr. Karasick: Would you mind stating what the purpose is so I will be——

Mr. Berke: No. We want to show this record shows this employee was sick to indicate there are records when an employee is sick that shows that they are ill. That is the purpose.

Mr. Karasick: But, as I understand it, there is no contention on your part now that she was not

(Testimony of Errol David Wilson.)

an employee of the Company on October 14, 1954?

Mr. Berke: No, no such contention.

Mr. Karasick: I see.

Q. (By Mr. Berke): Now you have produced here the time card and personnel payroll record of Marie Scheffler. The time card is for the pay period ending August 21; is that correct?

A. That is correct.

Q. Is that the last time card that you had—
Strike that.

What does that time card show with respect to the time that she worked during that payroll period?

A. She worked on Tuesday, August 17, according to the clock at 6:52 a.m., Tuesday morning, punched back from her meal period at 12:01, p.m., punched out at the end of the shift at [2672] 4:05, p.m.; worked eight hours.

Q. Now this next entry is the last entry on that card, is it, with respect to the time when Marie Scheffler worked during that payroll period?

A. It is.

Q. What does that show?

A. Shows on Wednesday morning she punched in to go to work at 6:01, a.m.

Q. All right. Now how many hours does the card show she worked that week?

A. No time. Oh, during the week, ten hours.

Q. Is some of that information on the personnel payroll record of Marie Scheffler?

(Testimony of Errol David Wilson.)

A. Personnel record shows the week ending, payroll period August 21, ten hours.

Q. Does it show how much she was paid?

A. \$9.50 gross pay, check No. 9626 was issued in amount of \$9.22.

Q. Now the next entry on the payroll record in Column 10 shows period ending 9/4 and then nothing appears after that. Do you know what that is, can you explain that?

A. I don't know why that was put on there, but if I might express the practice, what happens once in a while?

Q. Go ahead.

A. The payroll clerk, in making up the payroll, will draw a [2673] sheet from the files and place it in position to make the entries. And then before writing any further they had instructions to check the name again, make a double check, and they might enter the date, which has happened, and then they notice the error and would pull the sheet out without erasing the date.

Q. Now when is there next on this card a complete entry of a period during which Mrs. Scheffler worked?

A. The next entry is for the week ending November 13, 1954.

Q. Does that show how many hours she worked that week? A. Forty-eight hours.

Mr. Karasick: Pardon me. Would you read that answer, please?

(Answer read.)

(Testimony of Errol David Wilson.)

an employee of the Company on October 14, 1954?

Mr. Berke: No, no such contention.

Mr. Karasick: I see.

Q. (By Mr. Berke): Now you have produced here the time card and personnel payroll record of Marie Scheffler. The time card is for the pay period ending August 21; is that correct?

A. That is correct.

Q. Is that the last time card that you had—
Strike that.

What does that time card show with respect to the time that she worked during that payroll period?

A. She worked on Tuesday, August 17, according to the clock at 6:52 a.m., Tuesday morning, punched back from her meal period at 12:01, p.m., punched out at the end of the shift at [2672] 4:05, p.m.; worked eight hours.

Q. Now this next entry is the last entry on that card, is it, with respect to the time when Marie Scheffler worked during that payroll period?

A. It is.

Q. What does that show?

A. Shows on Wednesday morning she punched in to go to work at 6:01, a.m.

Q. All right. Now how many hours does the card show she worked that week?

A. No time. Oh, during the week, ten hours.

Q. Is some of that information on the personnel payroll record of Marie Scheffler?

(Testimony of Errol David Wilson.)

A. Personnel record shows the week ending, payroll period August 21, ten hours.

Q. Does it show how much she was paid?

A. \$9.50 gross pay, check No. 9626 was issued in amount of \$9.22.

Q. Now the next entry on the payroll record in Column 10 shows period ending 9/4 and then nothing appears after that. Do you know what that is, can you explain that?

A. I don't know why that was put on there, but if I might express the practice, what happens once in a while?

Q. Go ahead.

A. The payroll clerk, in making up the payroll, will draw a [2673] sheet from the files and place it in position to make the entries. And then before writing any further they had instructions to check the name again, make a double check, and they might enter the date, which has happened, and then they notice the error and would pull the sheet out without erasing the date.

Q. Now when is there next on this card a complete entry of a period during which Mrs. Scheffler worked?

A. The next entry is for the week ending November 13, 1954.

Q. Does that show how many hours she worked that week?

A. Forty-eight hours.

Mr. Karasick: Pardon me. Would you read that answer, please?

(Answer read.)

(Testimony of Errol David Wilson.)

Q. (By Mr. Berke): Now does this payroll record show the date Marie Scheffler was employed by SAGU?

A. Shows the date employed July 16, 1954.

Q. Does it show anything on there that would indicate why there are no entries after August 21, except this one item, "9/4," until November 13?

A. After the space entitled, "Date Terminated," there is a notation in pencil, "Sick, comp." I might explain that "comp" is the term used for compensation insurance. [2674]

* * * * *

Mr. Berke: However, you are not contending that the eligibility date was the payroll period any other than the payroll period ending October 2, 1954?

Mr. Karasick: No, as stated in the Board's Direction of Election.

Q. (By Mr. Berke): Do you have the payroll record of Virginia Azevedo?

A. I have. [2676]

* * * * *

Q. Now the payroll record shows date employed October 11, 1954, does it not? A. It does.

Q. And it shows date terminated when?

A. October 15.

Q. And you have the time card here for the payroll period ending October 16, '54, for Mrs. Azevedo, have you? A. I have.

Q. What does that show with respect to the first day that she actually worked at SAGU?

(Testimony of Errol David Wilson.)

A. Tuesday, October 12, 1954.

Q. Now how many hours does it show she worked that day? A. Seven hours.

Q. And does it show how many hours she worked the next day after that? A. It does.

Q. How many? A. Eight hours.

Q. And the next day after that?

A. Eight hours.

Q. And then the last day in that week?

A. Eight hours and fifteen minutes.

Q. And what was the last day in the week that she worked? A. Friday, October 15.

Q. And what are the total number of hours she worked that week? [2677]

A. Thirty-one and one-quarter.

* * * * *

Q. (By Mr. Berke): Now, do you have the payroll record for Gatha Crump? A. Yes.

Q. Now does the payroll record for Gatha Crump show the date [2678] when she was employed? A. There is a date shown, yes.

Q. Now it shows, does it not, there is typewritten in after the date employed, "10/14/54"; is that correct? A. It was typed in, yes.

Q. Now over the "4" in "14," there has been put a "1" in pencil; is that right? A. Right.

Q. So that it now reads, "Date employed October 11, '54," is that right? A. Right.

Q. And date terminated, as shown on that card, is October 15; is that correct? A. Yes.

Q. Now you have here the time card for Gatha

(Testimony of Errol David Wilson.)

Crump for the payroll period ending October 16, 1954, do you not? A. I do.

Q. What is the first entry on that card with respect to date which she worked?

A. Shows that she punched in Monday morning, October 11, at 7:13, a.m.; she punched in returning from her meal period at 11:54, a.m.; punched out at the end of the shift at 4:02, p.m.; worked seven and three-quarter hours that day.

Q. Now does the card show that she worked throughout that week from that day? [2679]

A. She worked up to Friday night.

Q. What time did she punch out on Friday, October 15? A. 4:15, p.m.

Q. Now how many hours does it show she worked that week? A. Forty hours.

Q. And does some of that information appear on the payroll record of Gatha Crump?

A. Shows that she worked in the week ending October 16, forty hours.

Q. And shows the amount she was paid?

A. Her gross earnings were \$38.12; check No. 254 in the amount of \$30.08 was issued, with a notation on the record that the check was mailed to her.

Q. Now do you have the payroll record of Gail Herrell? A. Yes.

Q. You have handed me the personnel payroll record and time card of Gail Herrell, have you not?

A. Yes.

Q. What does the personnel payroll record show with respect to the date that Gail Herrell was employed?

(Testimony of Errol David Wilson.)

A. Date employed, October 13, 1954.

Q. And what does it show with respect to the date terminated? A. October 15.

Q. Will you look at the time card for Gail Herrell for the pay period ending October 16, 1954, and tell us what it shows with [2680] respect to the first day that she worked during that period?

A. Shows that she punched in for work on Tuesday morning, October 12, 1954, at 7:32, a.m. She punched in returning from her meal period at 11:53, a.m.; punched out at the end of the shift at 4:03, p.m.; worked seven and a half hours.

Q. And did she work for the balance of that week through Friday, October 15, 1954?

A. Yes.

Q. How many hours did she work, had she worked that week altogether?

A. Thirty-one and three-quarters hours.

Q. Now is some of that information on the personnel payroll record of Gail Herrell?

A. Yes. It shows that the payroll period week ending October 16 she worked thirty-one and three-quarters hours.

Q. And how much was she paid, does that show on there?

A. Gross earnings were \$30.28. Check No. 266 was issued in the amount of \$28.47, notation that the check was mailed.

Q. Do you have the payroll record for Amy Sweningson? A. I have.

Mr. Karasick: Same problem, isn't it?

(Testimony of Errol David Wilson.)

Mr. Berke: Yes.

Q. (By Mr. Berke): Mr. Wilson, you handed me the personnel payroll record and two time cards for Amy Sweningson, did you not? [2681]

A. I did.

Q. Now what does the personnel payroll record show for her as to date employed?

A. October 4, 1954.

Q. And what does it show for the date terminated? A. October 15.

Q. Will you look at the time card for the payroll period ending October 9, 1954, for Amy Sweningson and tell us what it shows with respect to the first day that she worked during that period?

A. The first time clock punch shows that she checked in at 7:21, a.m., Tuesday, October 5. She punched in returning from her meal period 11:53, a.m.; punched out at the end of the shift at 4:03, p.m.; worked seven and three-quarter hours.

Q. Now does that show that she worked the balance of that week?

A. Yes, she did. It does show that.

Q. And that also shows Saturday as a work day during that period, does it not? A. It does.

Q. And will you tell us what it shows with respect to Saturday?

A. She punched in in the morning at 6:53, a.m.; punched out at the end of the shift at 12:00 noon.

Q. How many hours?

A. Five hours. [2682]

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(Testimony of Errol David Wilson.)

Q. (By Mr. Berke): Mr. Wilson, you have just handed me the payroll record and time cards for Rudolph O. Sweningson, have you? A. I have.

Q. What does the payroll record show with respect to the date that Mr. Sweningson was employed? A. October 4, 1954.

Q. And what does it show with respect to date of his termination? A. October 15.

Q. Now looking at the time card for the payroll period ending October 9, 1954, for him, what does it show with respect to the [2683] first day that he worked during that period?

A. Shows that he reported for work October 5, 1954, at 7:00, a.m. He punched out, or did not punch out, it is a pencil notation, "Out at 11:00 o'clock, a.m."; returned from his meal period at 11:49, a.m.; punched out the end of the shift at 4:00, p.m. Worked eight hours.

Q. Now the beginning time for him that date is in pencil, is it not? A. It is.

Q. And over in the lefthand column appears, "O.K." and some initial?

A. That is "S.S.," Steve Struempf.

Q. Now up on the very first line where the time punch could be entered there appears to have been something inserted in pencil and then erased; is that correct? A. That is correct.

Q. Tell us whether or not, looking at it, it is the same—Well, strike that.

Does it appear to have been in the far lefthand

(Testimony of Errol David Wilson.)

column, "O.K. S.S.," and then under "In," "7" in pencil, and under "Out," "11" in pencil?

A. It appears so.

Q. Now does Mr. Sweningson's card show that he worked five hours on Saturday, October 9?

A. Yes. [2684]

Q. And does it show a total of 37 hours for that payroll period? A. Yes.

Q. Is that information on his personnel payroll record?

A. It is. It shows for the payroll period ending October 9 he worked 37 hours.

Q. Now the time card for the pay period ending October 16 shows what date is the last day he worked?

A. Friday, October 15. [2685]

* * * * *

Q. (By Mr. Berke): All right, you have handed me the personnel payroll record of Marcia Freyling and two time cards, have you not?

A. I have.

Q. What does the personnel payroll record show with respect to the date that she was employed?

A. July 22, 1954.

Q. Does that payroll record contain entries for the payroll period ending July 24, 1954, to and including the payroll period ending November 20, 1954? A. It does.

Q. Now I note there is no entry for the payroll period ending October 2, 1954; is that correct?

A. That is correct. [2691]

(Testimony of Errol David Wilson.)

Q. So, with that exception, it contains entries from July 24 to and including November 20; is that correct? A. Right, correct.

Q. Looking at the payroll period ending October 16, 1954, does that show employment during that period?

A. October 16 shows she worked eight hours.

Q. And I show you a time card, and the top portion of which is in pencil, and it bears no date as to the pay ending period. Where did you take that card from, Mr. Wilson?

A. I don't remember.

Q. Is there a notation on this card with respect to Miss Freyling on the back?

A. (Reading) "School girl, Friday and Saturday."

Q. Now is there an entry that appears to have been made by time clock punching for Friday?

A. Friday shows that she checked in 3:54, p.m., reported back from her meal period at 8:23, p.m., checked out at 12:30, a.m.

Q. Worked how many hours?

A. Eight hours.

Q. And is that the total number of hours that appears on that time card? A. That is right.

Q. Now go to the payroll period ending October 23 on the personnel payroll record. What do the entries show with respect to the [2692] number of hours worked that week?

A. Shows October 23 she worked eight hours.

Q. Looking at her time card for the pay period

(Testimony of Errol David Wilson.)

ending October 23, 1954, is there an entry on that time card? A. There is.

Q. Will you tell us what it shows, please?

A. Shows that she checked in in the time clock Saturday morning, October 23, at 7:48, a.m.; returned from her meal period at 12:53, p.m., checked out at the end of the shift at 5:00 o'clock; worked eight hours.

Q. How many hours does it show she worked altogether during that period?

A. Eight hours.

Q. Is there a notation on the front of the card that says, "Over"? A. There is.

Q. And what does it say on the back?

A. (Reading) "School girl."

Q. Incidentally, going back to the previous time card, on the front of it is a notation that says, "Over"? A. There is.

Q. And then it contains on the back, "School girl, Friday and Saturday"; does it? A. Yes.

Q. Now what is the last entry on the personnel payroll record [2693] with respect to her employment?

A. Payroll period ending November 20, eight hours.

Q. Mr. Wilson, you have handed me the personnel payroll record and two time cards for Renee Napier. I notice that she is also referred to as "Rennic," R-e-n-n-i-e, Napier; is that correct?

A. Correct.

Q. What does the payroll record show with re-

(Testimony of Errol David Wilson.)

spect to the date that she was employed by the Company? A. October 1st, 1954.

Q. Now are there entries starting with the payroll period ending October 2, to and including the payroll period ending November 20, with the exception of the—No, strike that—no exception, is that correct? A. Right.

Q. I notice that on Line 6 there is the payroll period ending November 13. And then the next line 7 is blank. And Line 8 has entries for payroll period ending November 20. Is there some reason for the gap?

A. Only reason must be a clerical error.

Q. In what respect?

A. Inserting this payroll record sheet he must have lined it wrong.

Mr. Karasick: Well, in other words, I move to——

Mr. Berke: Is that critical, Mr. Karasick?

Mr. Karasick: I move to strike the witness' answer as being opinion and conclusion.

Trial Examiner: May I see it, please?

Q. ((By Mr. Berke): Does the next payroll period——

Trial Examiner: I think it is obvious, myself.

Mr. Berke: In view of Mr. Karasick's hyper supertechnical objection, I am going ahead.

Q. (By Mr. Berke): Is the next payroll period ending after November 13 the one ending November 20? A. It is.

Q. Does that appear on this record?

(Testimony of Errol David Wilson.)

A. It does. I wish to correct a prior statement I made saying that this shows continuous employment, the payroll record from October 2 to the week ending November 20. October 30 is not shown as a pay week ending October 30.

Q. Oh, yes. That is not on this record; is that right? A. Right.

Q. All right. With that exception, then, it shows employment entries from October 2 to the payroll period ending November 20; is that right?

A. It does, yes.

Q. Turning to the entries for the payroll period ending October 16, what does that show?

A. Shows the week ending October 16 she worked seven and three-quarters hours. [2695]

Q. And is there a payroll entry for the payroll period ending October 23, 1954?

A. There is. It shows that she worked seven and three-quarters hours.

Q. One of the time cards you handed me is for the payroll period ending October 16, is that correct? A. Correct.

Q. And there is just one day recorded on there as having been worked; is that correct?

A. That is correct.

Q. And what day is that and will you tell us what it indicates?

A. Time punched in Friday, October 15, 1954, 4:18, p.m.; returned from lunch period or meal period Friday, 8:24, p.m.; punched out at end of shift, 12:30, a.m.; worked seven and three-quarters hours.

(Testimony of Errol David Wilson.)

Q. 12:30, a.m., what day?

A. That would be Saturday, October 16.

Q. How many hours did she work altogether during that pay period?

A. Seven and three-quarters.

Q. Now looking at the other time card for the payroll period ending October 23, what does that show with respect to employment during that period?

A. Shows that she worked Saturday, October 23.

Q. All right. Now will you tell us what the entries are?

A. Punched in at 8:15, a.m., Saturday, October 23; returned [2696] from meal period 1:06, p.m.; punched out at 4:58, p.m.; worked seven and three-quarters hours.

Q. Now on the face of the card there is written in in pencil "Over"; is that correct?

A. There is.

Q. And on the reverse side appears in pencil, "School girl"; is that right? A. Right.

Q. Now Mr. Wilson, you have handed me the personnel payroll record of Catherine Perry, have you not? A. I have.

Q. What does that show with respect to the date that she was employed by the Company?

A. August 2, 1954.

Q. Now will you look at the record and tell us whether it shows entries for the payroll period ending August 7, through and including the payroll period ending December 11, 1954?

(Testimony of Errol David Wilson.)

A. It does.

Q. Looking at the entry for the payroll period ending October 16, 1954, does it show how many hours she worked during that week?

A. Forty hours.

Q. And does it show how much she was paid during that week?

A. Gross earnings, \$40.00; check No. 478 in the amount of \$13.50 was issued.

Q. \$13.50? [2697]

A. I beg your pardon, correction, \$31.58.

Q. Now will you look at the entry for the payroll period ending October 23. What does that show with respect to the number of hours worked?

A. Forty-eight hours.

Q. And does it show how much she was paid?

A. \$48.00; check No. 618 in the amount of \$37.86 was issued.

Q. Now going down to the last payroll period entry, December 11, 1954, does it show how many hours she worked then?

A. Forty-three hours.

Q. Does it show how much she was paid?

A. Forty-three gross earnings; Check No. 1743 in the amount of \$33.91 was issued. [2698]

* * * * *

Q. (By Mr. Berke): Do you have the payroll record here of Edith Wilson? A. I have.

Q. What does that show with respect to the date she was employed by the Company?

A. July 27, 1954.

(Testimony of Errol David Wilson.)

Q. Does it contain entries commencing with the payroll period ending July 31, 1954, to and including December 11, 1954? A. It does.

Q. Turning to the payroll period ending October 16, 1954, what does it show with respect to the number of hours that Edith Wilson worked that period? A. Forty.

Q. And how much was she paid?

A. Gross earnings, \$40.00; check No. 499 was issued in the amount of \$31.50.

Q. Now are there entries for the payroll period ending October 23, 1954? A. There are.

Q. How many hours did she work during that period? A. Forty-eight hours.

Q. And what does it show with respect to the amount she was paid for that period? [2699]

A. Gross earnings, \$48.00; check No. 645 was issued in the amount of \$37.86.

Q. Going down to the last entry, the one for the payroll period ending December 12, 1954, how many hours does it show she worked that period?

A. Payroll period ending December 11 is forty-three hours.

Q. And how much does it show she was paid?

A. Gross earnings, \$43.00; check No. 1765 was issued in the amount of \$33.91.

* * * * *

Q. (By Mr. Berke): You have handed me, Mr. Wilson, the personnel payroll record for an employee by the name of Erma Bate, have you?

A. I have.

(Testimony of Errol David Wilson.)

Q. What does it show with respect to the date she was employed by the Company?

A. July 19, 1954. [2700]

Q. And what does it show with respect to the last payroll period she worked in that year?

A. December 11, 1954.

Q. Turning to the payroll period entry for the period ending October 16, 1954, what does it show?

A. It shows period ending October 16, 1954, worked thirty-two and one-half hours.

Q. And how much was she paid during that period?

A. Gross earnings, \$32.50; check No. 391 issued in the amount of \$25.62.

Q. Now is there an entry for the payroll period ending October 23? A. There is.

Q. What does that show?

A. Period ending October 23, worked forty-eight hours.

Q. What was she—Does it show what she was paid?

A. Gross earnings, \$48.00; check No. 520 issued in the amount of \$37.86.

Q. Now what do the entries show for the last payroll period she worked, December 12, 1954?

A. Payroll period ending December 11, forty-one hours worked; gross earnings, \$41.00; check No. 1687 issued for \$32.27.

Q. I notice that during the payroll period ending October 16, as you testified, the number of hours was thirty-two and a half. That appears hereon; is

(Testimony of Errol David Wilson.)

that right? [2701] A. Right.

Q. For the payroll period ending December 4, 1954, the number of hours that appears thereon is also thirty-two and a half; is it not? A. Right.

* * * * *

Q. (By Mr. Berke): Mr. Wilson, you have handed me the personnel payroll record and three time cards for Mrs. Jessie W. Smith; is that correct? [2702] A. Yes.

Q. Now what does the payroll record show with respect to the date of her employment?

A. 9/13/54.

Q. Now there had been typed in "7" and then a blank space, and then "-54"; is that correct?

A. Right.

Q. And I note that the typed "7" is lined through, and "9/13" in pencil appears above it; is that correct? A. Yes.

Q. And what date of termination appears thereon? A. November 29, 1954.

Q. Now is there an entry for the payroll period ending October 16, 1954? A. There is.

Q. And what does that show with respect to the number of hours worked that week?

A. Period ending October 16, 1954, twenty-four hours.

Q. How much was paid her?

A. Gross pay, \$24.00; check No. 487 was issued in the amount of \$21.18.

Q. Now do you have the time card for that period? A. I do not.

(Testimony of Errol David Wilson.)

Q. Will you please produce that, then.

Now is there an entry for the payroll period ending October 23, 1954? [2703] A. There is.

Q. Does that show the number of hours worked for that payroll period?

A. Period ending October 23, twenty-four hours.

Q. Same number of hours as worked for the payroll period ending October 16? A. Yes.

Q. How much was paid Mrs. Smith for the payroll period ending October 23?

A. Gross pay, \$24.00; check No. 629 in the amount of \$21.58 was issued.

Q. Was the amount the same as was in the check issued for the payroll period ending October 16? A. Yes.

Q. Do you have the time card here for the payroll period ending October 23? A. Yes.

Q. And what does that show with respect to the first day worked?

A. Punched in Thursday, October 21, at 7:55, a.m.; she returned from her lunch period 12:27, p.m.; punched out at the end of the shift at 4:30, p.m.

Q. Worked how many hours?

A. Eight hours. [2704]

Q. Now what is the last entry for that payroll period? A. Saturday, October 23.

Q. Will you tell us what it says?

A. Punched in at 7:51, a.m.; returned from lunch or meal period 12:52, p.m.; punched out at the end of shift, 5:01, p.m.; worked eight hours.

(Testimony of Errol David Wilson.)

Q. How many hours all told does it show for that payroll period? A. Twenty-four hours.

Q. Now the last entry on the personnel payroll record is for the payroll period ending November 27, 1954; is that right? A. Yes.

Q. How many hours does it show she worked during that period? A. Twenty hours.

Q. How much was paid?

A. Gross earnings, \$20.00; check No. 1495 was issued in the amount of \$18.00.

Q. Now did you have the time card prepared for the payroll period ending November 27?

A. Yes.

Q. And what does that show with respect to the first day worked during that period?

A. Monday, November 22.

Q. What does it show?

A. Punched in at 7:54, a.m.; returned from meal [2705] period 12:25, p.m.; punched out at the end of the shift, 4:32, p.m.; worked eight hours.

Q. What is the last entry on that card with respect to the date and time worked that period?

A. Worked November 24, Wednesday, punched in at 7:53, a.m.; punched out at 12:03, p.m.; worked four hours.

Q. And how many hours does the card show she worked altogether during that period?

A. Twenty hours. [2706]

* * * * *

Q. (By Mr. Berke): Now you have handed me, Mr. Wilson, the personnel payroll record for Willy

(Testimony of Errol David Wilson.)

Augustin; is that correct? A. That is correct.

Q. What does that show with respect to the date he was employed by the Company?

A. July 23, 1954.

Q. And are there entries commencing with the payroll period ending July 24, 1954, to and including the payroll period ending December 11, 1954?

A. Yes.

Q. Now turning to the payroll period ending October 16, 1954, what does it show with respect to the number of hours he worked during that period?

A. Period ending October 16, 1954, forty-two and one-quarter hours.

Q. And how much was he paid?

A. Gross earnings, \$54.93; check No. 389 was issued in the amount of \$52.68.

Q. Now is there an entry for the payroll period ending October 23, 1954? A. There is.

Q. How many hours does it show he worked during that period? [2709]

A. Fifty and one-half hours.

Q. And what does it show he was paid?

A. \$65.65 gross earnings; check No. 518 was issued in the amount of \$61.18.

Q. Now the last entry is for the payroll period ending December 11, 1954; is that correct?

A. Correct.

Q. What does it show as to number of hours he worked during that payroll period?

A. Forty-five and one-quarter hours.

(Testimony of Errol David Wilson.)

Q. And what does it show he was paid?

A. Gross earnings, \$58.83; check No. 1685 was issued in the amount of \$55.76.

Q. Mr. Wilson, you have handed me the personnel payroll record of Joe Bertoni, have you?

A. I have.

Q. And does that show the date of employment as being September 28, 1954? A. It does.

Q. And are there entries commencing with the payroll period ending October 2, 1954, to and including the payroll period ending December 11, 1954? A. There are.

Q. Now turning to the payroll period ending October 16, 1954, how many hours does it show and what amount does it show was paid him? [2710]

A. Period ending October 16, 1954, forty-two and one-quarter hours; gross earnings, \$54.93; check No. 321 was issued in the amount of \$48.08, with notation that payment was stopped on that check and issued new check 1223, with an additional note, "Mailed check."

Q. Will you tell us what the entries show with respect to the payroll period ending October 23 as to the number of hours worked and the amount paid in that period?

A. Period ending October 23, forty hours, gross earnings \$52.00, check No. 523 issued in the amount of \$45.64.

Q. Now going down to the last entry for the payroll period ending December 11, 1954, tell us

(Testimony of Errol David Wilson.)

what the entry shows with respect to the hours and the amount paid?

A. Period ending December 11, 1954, forty-three and one-half hours, gross earnings \$56.55, check No. 1689 issued in the amount of \$49.25.

Q. Mr. Wilson, you have handed me the personnel payroll record and two time cards for Robert DeVilbis? A. I have.

Q. Does the payroll record show that he was employed on July 19, 1954? A. It does.

Q. And are there entries beginning with the payroll period ending July 24, 1954, to and including the payroll period ending November 6, 1954?

A. Yes. [2711]

Q. Turning to the payroll period ending October 16, 1954, does that show how many hours he worked that week?

A. Period ending October 16, 1954, worked nine hours.

Q. How much was he paid?

A. Gross earnings, \$12.60; check No. 417 was issued for \$9.95.

Q. Turning to the entry for the payroll period ending October 23, 1954, does it show how many hours he worked during that period?

A. Eight hours.

Q. What was he paid?

A. Gross earnings, \$11.20; check No. 550 was issued for \$8.85.

Q. Now how many hours is shown as having

(Testimony of Errol David Wilson.)

been worked on each of the following pay periods, namely, October 30 and November 6?

A. Eight hours each.

Q. Was he paid, according to the payroll record, the same amount as paid for the payroll period ending October 23? A. He was.

Q. Now I show you one of the time cards for Mr. DeVilbis for the pay period ending October 16, 1954. Is it correct that it contains entries only for one work day? A. That is right.

Q. Will you tell us what it shows, please?

A. Shows that he came to work Saturday, October 16, and this [2712] is written in in pen, 8:00, a.m. To the left of that there are initials, "S.A." He punched out for the lunch period at 12:23, p.m.; returned to work after the lunch period at 1:04, p.m.; punched out at the end of the shift 5:38, p.m.; worked nine hours.

Q. What does it show for the total number of hours worked during that period?

A. Nine hours.

Q. I show you time card for Mr. DeVilbis for the pay period ending October 23, 1954. Is it correct that it shows entries for just one work day?

A. That is right.

Q. Will you tell us what it shows, please?

A. It shows that he worked Saturday, October 23; punched in on the clock at 7:56, a.m.; punched out at the meal period 11:59, a.m.; punched back in at 12:55, p.m.; punched out at the end of the shift 5:01, p.m.; worked eight hours.

(Testimony of Errol David Wilson.)

Q. What were the total number of hours worked that period? A. Eight hours.

Q. There is what appears to be the letters, "J.A.," or "O"? A. "J.A."

Q. Who is that?

A. John Aguire uses that initial for—he is superintendent of the warehouse. [2713]

* * * * *

Q. Mr. Wilson, you have handed me the personnel payroll record of Lloyd Mills; is that correct? A. Yes.

Q. And does it show the date of employment as being October 11, 1954? A. It does.

Q. Now are there entries on that record commencing with the payroll period ending October 16, 1954, to and including the payroll period ending December 31, 1954? A. It does.

Q. Turning to the payroll period ending October 16, 1954, will you tell us the number of hours it shows and how much was paid?

A. Period ending October 16, 1954, forty-six hours; gross earnings, \$57.50; check No. 465 was issued in the amount of \$52.37.

Q. Now turning to the payroll period ending October 23, 1954, what does it show with respect to the hours and the amount paid Mr. Mills? [2715]

A. Period ending October 23, 1954, worked forty-seven and three-quarter hours; gross earnings were \$59.69; check No. 607 was issued in the amount of \$54.10.

Q. Now turning to the payroll period ending

(Testimony of Errol David Wilson.)

November 27, 1954, what does that show with respect to hours and amount paid?

A. Period ending November 27, 1954, hours worked, twenty-two and three-quarters; gross earnings, \$28.44; check No. 1475 was issued in the amount of \$27.59.

Q. Now for the payroll period ending December 18, what does that show?

A. Period ending December 18, 1954, worked forty-one hours; gross earnings, \$51.25; check No. 1819 issued in the amount of \$47.41.

Q. Now the last entry is for the payroll period ending December 31, 1954, as you testified. Will you please tell us what it shows with respect to the hours and pay?

A. Period ending December 31, 1954, worked forty hours; gross pay, \$50.00; check No. 1888 issued in the amount of \$46.30. [2716]

* * * * *

Q. (By Mr. Berke): Mr. Wilson, you have handed me the personnel payroll record and three time cards for Henry Narron, have you?

A. Yes.

Q. What does the record show with respect to the date of Mr. Narron's employment?

A. 7/8/54.

Q. Now written in in pencil is the word, "Retained"; do you know what that means?

A. I do not.

Q. Now what was the date terminated indicated thereon? A. November 6, 1954.

(Testimony of Errol David Wilson.)

Q. Now are there entries on this record commencing with the payroll period ending July 10, 1954, to and including the period ending November 6, 1954? A. There are.

Q. Now turning to the payroll period ending October 16, 1954, will you tell us what that shows with respect to the number of hours worked by Mr. Narron and the amount paid? Before you answer that, is it correct that there are two entries for the payroll period ending October 16?

A. There are.

Q. All right. Will you give us both of those, please?

A. On Line 3 of the personnel record, period ending October 16, 1954, forty-six and a half hours; gross earnings, \$60.45; check No. 327 issued in the amount of \$49.94. [2717]

Line 4, period ending October 16, twelve hours; gross earnings, \$12.00; check No. 469 issued in the amount of \$11.64.

Q. All right. Now will you look at the time card for October 16, 1954. There are two for that period, are there not, two time cards? A. There are.

Q. Now the first one has typing on the top and the pay period is stamped thereon; is that correct?

A. Correct.

Q. And what are the job numbers indicated on there? A. 7401 and 7402.

Q. Do you know what they, what jobs they indicate? A. I cannot remember now.

Q. Now what is the first entry on that particu-

(Testimony of Errol David Wilson.)

lar time card with respect to the time worked by Mr. Narron?

A. Shows that he punched in at 4:54, p.m., Monday, October 11; punched out for meal period at 9:31, p.m.; punched back in at 9:59, p.m.; punched out at the end of the shift Tuesday morning at 3:32, a.m.; worked ten hours.

Q. Now what is the last entry for a day worked during that period?

A. Friday, October 15; punched in at 4:56, p.m.; punched out for meal period 8:45, p.m.; returned from meal period 9:16, p.m.; punched out the end of the shift, Saturday, 2:21, a.m.; worked eight and three-quarter hours. [2718]

* * * * *

Q. (By Mr. Berke): Does the card indicate whether he worked day or night shift?

A. Night.

Q. And what are the total number of hours worked for that pay period ending October 16, 1954, according to the time card?

A. Forty-six and one-half hours.

Q. Will you look at this time card in pencil for the pay period ending October 16, 1954. Is it correct that it has in a circle the number of 8003?

A. Correct.

Q. Will you tell us what that stands for?

A. That would be the job number.

Q. Do you know what job that would be?

A. I don't remember. There are too many of them.

(Testimony of Errol David Wilson.)

Q. Well is it indicated on there, on the card itself, as to what his job was at that point?

A. Night watchman.

Q. And I note written on the face of the card, "\$1.00"; is that correct? A. Correct.

Q. What is the entry with respect to a day that was worked or [2719] the period that he worked as shown by that card?

A. Written in in pencil on the last line of the time time clock brackets, "Started at 7. Out at 5. 12 hours."

Q. And the total number of hours is indicated on that card? A. Twelve hours.

Q. Will you turn to the time card for the payroll period ending October 23, 1954, for Mr. Narron. That card appears in both pencil and ink, does it not? A. It does.

Q. Except for the printed portions; is that right? A. Right.

Q. Now is it correct that it contains on the face of it, "Night Watchman"? A. It does.

Q. And No. 8003? A. Right.

Q. What is the first entry on that card with respect to work by Mr. Narron during that period?

A. On the first line in the brackets where the clocks normally punch: "In at 7. Out at 5. 10 hours."

Q. And that is all in pencil?

A. That is in pencil.

Q. Now what is the last entry?

A. Last entry is in the last line in that block

(Testimony of Errol David Wilson.)

on the card written in pencil: "In at 7 a.m. Out at 4"—Beg your pardon, [2720] no "a.m." written. "In at 7. Out at 4. 9 hours."

Q. And that is in pencil, too?

A. That is in pencil.

Q. And what is the total number of hours indicated on the card for that period?

A. Fifty-six hours.

Q. Now the last entry appears to be for November 6, 1954; is that correct? A. Correct.

Q. Will you please tell us what it shows as to the hours and amounts paid?

A. Period ending November 6, 1954, 54 hours; gross earnings, \$54.00; check No. 1013 issued in the amount of \$44.88.

Q. By the way, does this payroll record contain information with respect to the payroll period ending October 23, 1954, that appears on the time card for that period that you just testified about?

A. Period ending October 23, 1954, 56 hours.

Q. What is the amount paid?

A. Gross earnings, \$56.00; check No. 611 issued in the amount of \$46.42. [2721]

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Direct Examination—(Resumed)

Q. (By Mr. Berke): Mr. Wilson, during the noon recess you were to get the time cards for Erma Bate for the period ending October 16 and October 23. Have you got those? A. Yes.

Q. I show you, Mr. Wilson, one of the two time cards for Erma Bate. You have the one for the

(Testimony of Errol David Wilson.)

pay period ending October 16, 1954. That is both printed and — the information on there is both printed and typed at the top, is it not; except for a pencilled notation, "Went home ill"; is that correct? A. Correct.

Q. Now, what is the first work day entry on that card?

A. Monday, October 9—No, correction—October 11, 1954.

Q. Will you tell us what it shows?

A. Reported, checked in on the clock Monday afternoon at 3:59, p.m., reported back in from meal period at 8:58, p.m., checked out Tuesday morning, 12:56, a.m.; worked eight hours. [2731]

Q. What is the last entry on there?

A. Friday, October 15, punched in at 3:56, p.m. The next indication is a pencil notation with the initial "H" before it, 4:30.

Q. That also is in pencil?

A. That also is in pencil.

Q. And that appears in the "In" column?

A. Appears in the "In" column.

Q. And what is the time indicated for that day?

A. One-half hour.

Q. And what is the total number of hours worked that week? A. 32½.

Q. Now do you know whose initial "H" is?

Mr. Karasick: Well I object to that. A single letter is not an initial.

Q. (By Mr. Berke): All right. Do you know what the "H" stands for?

(Testimony of Errol David Wilson.)

A. "H" stands for Herrerias, the night floor-lady.

Q. All right. Now look at the time card for the pay period ending October 23, 1954. At the top is it correct that it is typed and printed and the date is stamped thereon? A. It is.

Q. By the way, on the time card for the pay period ending October 16, the date is also stamped on there, is it not, October 16? [2732]

A. It is.

Q. What is the first entry with respect to a work day on that card?

A. Monday, October 18, checked in 8:01, a.m., returned from meal period at 12:57, p.m., checked out at 5:00, p.m.; eight hours.

Q. Now on the next line there appears under—well, will you please read it?

A. The next line, Tuesday, checked in 7:54, a.m., returned from meal period, 12:26, p.m. Under the "Out" column the time clock reads 3:25, p.m., but through that "3:25" there is a pencil line and written after it is written in in pencil, "4:30."

Q. How many hours? A. Eight hours.

Q. Now what is the last entry on that card?

A. Saturday, October 23, 1954, checked in 7:51, a.m., returned from meal period 12:54, p.m., checked out at 4:54, p.m.; eight hours.

Q. What is the total number of hours indicated on the card for that pay period?

A. Forty-eight hours.

Q. Now have you got the time card for the pay

(Testimony of Errol David Wilson.)

period ending October 16 for Jessie Smith? That was Mrs. Jessie Smith? A. Yes.

Q. This card for Jessie Smith, Mrs. Jessie Smith, for the pay [2733] period ending 10/16/54 is written in pencil at the top except for the portions that are printed; is that correct?

A. That is correct.

Q. And the first entry for——

Mr. Karasick: Pardon me. May I have that last question and answer?

(Question and answer read.)

Mr. Karasick: Go ahead.

Q. (By Mr. Berke): Will you tell us what date and what entry appears thereon for the first work day shown on that card for that period?

A. First entry, Tuesday, October 12, checked in 3:56, p.m., returned from meal period 8:58, p.m., checked out at 1:01, a.m., Wednesday, eight hours worked.

Q. And what is the last day indicated on there as having been worked?

A. Thursday, October 14.

Q. Will you tell us what it shows?

A. Under the "In" column it has been stamped over and it is not very distinct. The "Thursday" is plain, but the time——

Q. The time can be either 4:01 or 3:54, is that correct, depending on which——

A. Could be.

Q. In any event, both figures, one is stamped over the other; is that right? [2734]

(Testimony of Errol David Wilson.)

A. That is right.

Q. What is the next entry?

A. Reported, checked back in from meal period 8:25, p.m., Thursday; checked out end of shift 12:31, a.m., Friday; eight hours' work.

Q. Now in the far lefthand column opposite the stamped over time appears a letter "H" in pencil. Do you know what that is?

A. It indicates the floorlady Herrerias okaying the stamped over time.

Q. And how many hours does the card show worked that week?

A. Twenty-four hours. [2735]

* * * * *

Q. Mr. Wilson, at my request did you check the Appendices to the Complaint in this hearing against the Company's payroll records to determine whether any of the people listed in the Appendices were people who did not return to complete or work the night shift on October 15, 1954? A. I did.

Q. I show you a document marked for [2737] identification as Respondent's 19 and ask you what that is.

(Thereupon the document above referred to was marked Respondent's Exhibit No. 19 for identification.)

A. That is a list of employees whose names appear in Appendix A of the Complaint who did not return to work on the night shift of October 15, following the meeting of those two shifts.

(Testimony of Errol David Wilson.)

Q. Where was the information that appears on Respondent's 19 taken from?

The Witness: May I ask you to put that question again?

Mr. Berke: Yes. Will you give him the question?

(Question read.)

A. From the payroll cards, payroll personnel records.

Q. (By Mr. Berke): From time cards?

A. Time cards.

Q. And are the time cards and the payroll personnel records for all the individuals listed thereon, some 29 individuals, here in the hearing room?

A. They are.

Q. Now opposite the names of the individuals listed on Respondent's 19 for identification are parentheses with figures in them. What do they represent?

A. The numerals in the parentheses indicate the numerical position which these names or persons appear either in the female or male list of Appendix A of the Complaint. Some of these individuals also appear in Appendix B of the Complaint. [2738] And there is a second parentheses there listing those appearing in B.

Mr. Berke: I offer Respondent's 19 in evidence.

Trial Examiner: Any objection?

Mr. Karasick: Objected to on the same grounds and for the same reasons as were advanced with respect to Respondent's Rejected Exhibit 18. [2739]

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(Testimony of Errol David Wilson.)

Trial Examiner: Well, if there is an objection, I will have to sustain the objection. [2740]

* * * * *

Q. (By Mr. Berke): Mr. Wilson, I show you the time card for the pay period ending October 16, 1954, for Lyman Allman, which you handed me, and at the top there is a pencilled notation. What does that say? A. "Quit October 15."

Q. And going down to October 15 on the card, is there any entry for that day at all?

A. Punched out Friday, 1:28, but that was the completion of the Thursday shift.

Q. Which began at what time?

A. 4:00 o'clock Thursday, the 14th.

Q. Is there anything to indicate that he began or completed his shift on Friday? A. No.

Trial Examiner: He didn't even punch in then?

Mr. Berke: No.

Q. (By Mr. Berke): Turning to the time card of Richard Breuer for the pay period ending October 16, 1954, there is a pencilled [2742] notation at the top. What does that state?

A. "Quit 10/15."

Q. And going down to the October 15 entry on that card, what appears on there?

A. October 15, in the first "In" bracket it has been stamped over. The time appears to be checked in at 3:38, p.m., Friday. It is stamped over with 4:17. The "Out" time shown is Friday, 4:17, p.m. Time, one-half hour.

Mr. Karasick: May I see that? O.K.

(Testimony of Errol David Wilson.)

Q. (By Mr. Berke): I show you the time card for Virginia Brott for the pay period ending October 16, 1954. Is it correct that among other things at the top of that card are the words, "Quit October 15"?

A. There are words to that effect, correct.

Q. To that effect, or are the words as I read them?

A. I didn't answer properly. The words are there as you read them.

Q. Will you go down to the October 15 date on that card and tell us what it shows, please?

A. Checked in time clock 3:56, p.m., Friday.

Q. And is that all that is indicated by way of "In" and "Out" time for that day?

A. That is all there is indicated.

Q. What was the total time calculated as having been worked that day? [2743]

A. One-half hour.

Q. I show you the time card for Elizabeth Cooley for the pay period ending October 16, 1954.

Mr. Karasick: Pardon me. May I interrupt you again? You asked about the time calculated for working that day. You mean there is a pencil notation on the time card which shows that there was a half hour after a punch-in which shows only 3:56 and no punch-out? Is that right?

Mr. Berke: That is correct.

Q. (By Mr. Berke): Now with respect to Elizabeth Cooley's card for the pay period ending October 16, 1954, among other things at the top of the

(Testimony of Errol David Wilson.)

card appears the following: "Quit October 15," is that correct? A. Correct.

Q. Now will you go down to the date October 15 and tell us what appears in the card for that day?

A. Under the "In" column, rang in at 3:54, p.m.; under the "Out" column, 4:30, p.m.

Q. And how much time is indicated on there as having been worked or having been calculated?

A. One-half hour.

Q. Will you turn to the time card for Anna Hance for the pay period ending October 16, 1954. There is a word written in pencil at the top of the card which is what? A. "Quit." [2744]

Q. Will you look down to the October 15 entry on that card and tell us what it shows?

A. Rang in time clock 6:55, a.m. Checked out 10:57, a.m.

Q. What is the total number of hours that appears on the card for that day?

A. Four hours.

Q. And that is for the 15th, is it?

A. 15th is correct.

Q. Will you look at the time card for the pay period ending October 16, 1954, for Kathleen Hontar. At the top of the card there appears in pencil, "Quit October 15"; is that correct?

A. That is correct.

Q. Will you go down to the October 15 entry on that card and tell us what it shows, please?

A. Checked in 3:57, p.m. Checked out 4:32, p.m.

(Testimony of Errol David Wilson.)

Q. How much time is indicated on that card for that day? A. One-half hour.

* * * * *

Mr. Berke: Mr. Trial Examiner, you had indicated previously, and I overlooked your request, that you would like to have some information about Lyman Allman. And, before I go on further, I will ask Mr. Wilson about it. You wanted to know what shift he worked on. [2745]

Q. (By Mr. Berke): Is it correct his time card for the pay period ending October 16, 1954, indicates he worked the night shift?

A. That does.

Q. What was his job number? A. 7102.

Q. And what does that indicate as to the type of job he had, Mr. Wilson?

A. That was in the cannery along the preparation—receiving and preparation work. I don't know in particular which job that would be.

Trial Examiner: May I see it just a second? Do you mind if I ask one more question?

Q. (By Trial Examiner): Will you read to us, Mr. Wilson, the total number of hours for each of the weeks during his employment?

A. Period ending September 4, 1954, 21 hours.

Period ending September 11, 38 hours.

Period ending September 18, 37 hours.

Period ending September 25, 24 hours.

Period ending October 2, 41½ hours.

Period ending October 9, 33¾ hours.

Period ending October 16, 37½ hours.

(Testimony of Errol David Wilson.)

Trial Examiner: Thank you. [2746]

Q. (By Mr. Berke): Now, Mr. Wilson, will you look at the time card of Norma Morien for the pay period ending October 16. There is a pencilled notation on the top reading, "Quit October 15," is there not? A. There is.

Q. Will you turn to the October 15 date on that card and tell us what entries appear thereon?

A. Checked in 3:55, p.m.

Q. Is there any time punched out or clocked out? A. There is no time out.

Q. What is the next entry on that date?

A. One-half hour.

Q. And that is in pencil?

A. That is in pencil.

Q. Will you turn to the time card of Bernice Nunes for the pay period ending October 16, 1954, and looking at the top thereof, is there in pencil the words, "Quit October 15"? A. There is.

Q. Now going to that date on this card, will you tell us what the entries are?

A. Checked in 3:59, p.m. And that is the only time clock entry. One-half hour.

Q. And that one-half hour is in pencil?

A. In pencil.

Q. There is no time punched or clocked for "Out," is there? A. There is not. [2747]

Q. Now will you turn to the time card of Albert Rahm for the pay period ending October 16, 1954. Is it correct that among other things in pencil at the top appears "Quit 10/15"? A. There is.

(Testimony of Errol David Wilson.)

Q. Will you go to the entries for that date on the card and tell us what they show?

A. Checked in time, 4:50. There is some kind of mark over; it isn't distinct; it doesn't look like it has been stamped over, but it is time clocked 4:50. Under the first column, checked in, Friday, that is the 15th of October, 4:56. Checked out 5:31. Stamped over—that is 5:31, p.m.—Stamped over the portion of the first column is the Friday, the "Fr" is not entirely distinct.

Q. It got over into the "In" column?

A. Into the "In" column.

Q. On top of the "56," the "56" in the 4:56, in the end column? A. That is correct.

Q. What is the other entry on the card there for that date? A. In pencil, one-half hour.

Q. Will you look at the time card for the pay period ending October 16, 1954, for Evelyn Schrum. Is it correct at the top in pencil appear the words, "Quit October 15"? A. They do.

Q. Will you go down to the date on that card and tell us what [2748] the entries are for that date?

A. October 15, Friday, checked in 3:54, p.m. There is no other time clock entry showing any time checked out. In pencil, one-half hour.

* * * * *

Q. (By Trial Examiner): With respect to Albert Rahm, there are some initials apparently okaying a mistake or deviation from the time card that

(Testimony of Errol David Wilson.)

you had a minute ago. Can you state for the record whose name that would represent?

A. Charles Williams.

Q. Night Foreman?

A. Night Foreman of the cannery.

Q. And that correction was for what date?

A. 10th.

Q. October 10th?

A. Let me correct that—Let's see—12th, Tuesday the 12th.

Q. 11th, wouldn't that be? [2749]

Mr. Berke: No. Tuesday, October 12.

Trial Examiner: I thought you said 12. I asked for correction.

Should be 12.

The Witness: 12.

Trial Examiner: October 12, 1954.

The Witness: Tuesday, the 12th.

Q. (By Mr. Berke): Mr. Wilson, did you check the Appendices to the Complaint against the payroll records of the Company for the purpose of determining which individuals who appear in the Appendices were individuals that had worked on the night shift and were laid off on October 15, 1954, but completed their shift on that day?

A. I did.

Q. And have you the records here, the time cards and the personnel payroll records of such individuals?

A. I have.

Mr. Berke: Let the record show that I have

(Testimony of Errol David Wilson.)

handed those to Counsel for the General Counsel, as I have the previous payroll records.

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Q. (By Mr. Berke): Mr. Wilson, you handed me the time card and personnel payroll record for Ethel Blair, did you not? A. Yes. [2750]

Q. Now her personnel payroll record shows that she was employed on July 22, 1954; is that correct?

A. It does.

Q. Her employment terminated with the Company on October 15; is that correct?

A. Correct.

Mr. Karasick: Well now, her personnel card contains a notation in ink with the date of termination 10/15; is that what you are saying?

Mr. Berke: Yes, that is what I am saying. What is wrong?

Q. (By Mr. Berke): Now the personnel record has for the month of October three separate entries, does it not? A. It does.

Q. For the payroll period ending October 2, payroll period ending October 9, and payroll period ending October 16; is that correct?

A. It does.

Q. Looking at her time card, the payroll period ending October 16, 1954, is it correct that shows she worked on the night shift?

A. Yes, it does.

Q. And will you look at the entries for October

(Testimony of Errol David Wilson.)

15 on that card and tell us what they show, please?

A. Checked in Friday, October 15, 4:06, p.m. Checked back from meal period, 8:23, p.m. Checked out end of shift, Saturday, 1:36, a.m. [2751]

Q. And on the righthand side in pencil appears the figure "9," is that correct? A. Correct.

Q. That stands for what?

A. The number of hours worked.

Q. That day? A. That day.

Q. How many hours had she worked that week?

A. 46½.

Q. Now does that information appear on her personnel payroll record, and if so will you read it, please?

A. Her personnel record, period ending October 16, 46½ hours.

Q. And will you read the amount that was paid?

A. Gross earnings, \$49.75; check No. 333 in the amount of \$46.25 was issued. Notation on the record that the check was mailed.

Q. And are there any further entries on the personnel payroll record of Ethel Blair after the payroll period ending October 16, 1954?

A. No other entries except the totals for the quarter and the year at the bottom in pencil.

Q. You have handed me the personnel payroll record and time card for Doris Browning; is that correct? A. Correct. [2752]

Q. And the personnel payroll record shows date employed July 20, 1954, does it? A. It does.

Q. Now typed after "Date Employed" is July

(Testimony of Errol David Wilson.)

9, 1954, and a pencil line appears through "9" and above it is written in pencil, "20." Is that correct?

A. Correct.

Q. And the date terminated appears in ink as 10/15; is that correct? A. It does.

Q. Now for the month of October on the personnel payroll record there appear three entries, do there not, covering the payroll period ending October 2, October 9, and October 16; is that correct?

A. That is correct.

Q. Turning to the time card for Doris Browning for the period ending October 16, 1954, that indicates she worked on the night shift, does it not?

A. It does.

Q. And will you turn to the entries for October 15 on that card and tell us what they show?

A. October 15, Friday, checked in 3:56, p.m., returned from meal period 8:26, p.m., checked out at end of shift, Saturday, 12:32, a.m., and worked eight hours. [2753]

Q. And what are the total number of hours as indicated on the card she worked for that period?

A. Forty hours.

Q. Are there any entries on the personnel payroll record of Doris Browning after October 16, that is after the period ending October 16, 1954?

A. There are no entries except the totals for the year and the quarter.

Q. Which appear at the bottom?

A. Bottom of the page.

Q. Now you have handed me the payroll per-

(Testimony of Errol David Wilson.)

sonnel record—or strike that—the personnel payroll record and the time card for Helene Edwards; is that correct? A. That is correct.

Q. Now on the payroll record, date employed is indicated as July 22, 1954; is that right?

A. That is correct.

Q. Date terminated contains a notation in ink, “10-15”; is that correct? A. Correct.

Q. Now on this same record there are three entries for the month of October covering the payroll periods ending October 2, October 9, October 16; is that correct? A. That is correct.

Q. Will you turn to the time card for Helene Edwards for the [2754] period ending October 16, 1954, and going to the entries for October 15 will you please tell us what they show?

A. Friday, October 15, the “In” punch has been stamped over. I can’t make it all out. Looks like 4:25. There is written in pencil immediately over that number “4,” indicating 4:00 o’clock. She punched in from the meal period at 8:30, p.m. Punched out at 1:36, a.m., Saturday morning. Worked nine hours.

Q. And what are the total number of hours indicated on the card for that period? A. 36¾.

Q. Going to Helene Edwards’ personnel payroll record, are there any entries for any period after the period ending October 16, 1954?

A. There are no entries after the week ending, the period ending October 16, 1954, except the total

(Testimony of Errol David Wilson.)

for the quarter and the year at the bottom of the page.

Q. Now you have handed me the personnel payroll record and time card for Nancy R. Mazzucchi; is that right? A. That is right.

Q. And is the date of employment indicated on there? A. Written in in pencil, 9/14/54.

Q. And is the date of termination indicated on there, date terminated contained?

A. Written in ink, October 15.

Q. Now is it correct that for the month of October, 1954, [2755] there are three entries for the pay periods ending October 2, October 9, and October 16? A. There are.

Q. Now going to the time card for Nancy Mazzucchi, is it correct that there is indicated on there that she worked the night shift? A. It is.

Q. Will you turn to the entries for October 15 on that card and tell us what they show?

A. Friday, October 15, checked in at 4:00, p.m.; checked in after meal period, 8:25, p.m.; checked out 12:35, a.m., Saturday morning, at end of shift; worked eight hours.

Q. And what was the total number of hours for that pay period as indicated on the time card?

A. Forty hours.

Q. Now are there any entries on the personnel payroll record for any payroll period after the period ending October 16, 1954?

A. There are no entries excepting the totals at the bottom of the page.

(Testimony of Errol David Wilson.)

Q. For the quarter and year?

A. For the quarter and year.

Q. Now you have handed me the personnel payroll record and time card of David Darden; is that correct?

A. That is correct.

Q. Looking at the personnel payroll record, what is the date [2756] indicated for date employed?

A. July 29, 1954.

Q. And what is the date for date terminated indicated thereon?

A. October 15.

Q. Now is it correct that the personnel payroll record contains three entries for the month of October for the payroll periods ending October 2, October 9, and October 16?

A. It is correct.

Q. Now turning to the time card for David Darden for the payroll period ending October 16, 1954, is it correct that it indicates thereon that he worked the night shift?

A. It does.

Q. Will you turn to the entries for October 15 and tell us what they show?

A. Friday, October 15, checked in 3:59, p.m.; checked out for meal period, 9:02, p.m.; returned from meal period, 9:13, p.m.; checked out at end of shift, 2:31, a.m., Saturday; hours 10 $\frac{1}{4}$.

Q. Now what does the time card indicate with respect to the total number of hours worked for that pay period?

A. 54-3/4ths.

Q. Turning again to the personnel payroll record, does it contain any entries for any payroll period after the payroll period ending October 16, 1954?

(Testimony of Errol David Wilson.)

A. It does not contain any entries except the totals for the quarter and the year at the bottom of the page. [2757]

Q. Now you have handed me the personnel payroll record and time card of Harry McCall; is that correct? A. That is correct.

Q. What does the personnel payroll record indicate as to date employed?

A. September 29, 1954.

Q. And what does it indicate as to date terminated? A. October 15.

Q. Now is it correct that the personnel payroll record contains three entries for the month of October for the payroll periods ending October 2, October 9, and October 16? A. It does.

Q. Turning to the time card for the pay period ending October 16, 1954, is it correct that Mr. McCall's time card indicates he worked the night shift?

A. It does.

Q. Now will you go to the October 15 entry on that card and tell us what it shows?

A. Friday, October 15, checked in four p.m.; checked in after meal period, 8:26, p.m.; checked out at end of shift, 1:19, a.m., Saturday; worked 8-3/4ths hours.

Q. What does the card show for the total number of hours worked that week? A. 42-3/4ths.

Q. Now looking again at the personnel payroll record, does that [2758] contain any entries for payroll periods after the payroll period ending October 16?

(Testimony of Errol David Wilson.)

A. It contains no entries except the total at the bottom of the page for the quarter.

Q. You have handed me the personnel payroll record and time card of Alvin Marra, is that correct?

A. That is correct.

Q. What does the personnel payroll record show with respect to when Mr. Marra was employed, date employed?

A. July 21, 1954.

Q. And what does it show with respect to date terminated?

A. October 15.

Q. Now is it correct that that record contains entries for the month of October covering the payroll periods ending October 2, October 9, and October 16?

A. It does.

Q. Looking at Mr. Marra's time card for the pay period ending October 16, 1954, does it indicate that he worked the night shift?

A. It does.

Q. Will you go to the October 15 entry and tell us what it shows?

A. In pencil is written in, in pencil under the "In," "12." And it is initialed by "C.R.W."

Q. Now, is that the same person you indicated before? [2759]

A. Charles Williams, the night foreman.

In ink, it is written in on the "Out" time, 11:00. That is initialed by "S.A."—I don't know whether that is an "A"; whether that is "A.A." or "A.H." I can't make it out.

Worked 10-3/4ths hours.

Q. That "11" appears in ink, does it?

A. It does.

(Testimony of Errol David Wilson.)

Q. And the initials "S.A." are also in ink?

A. Yes.

Q. And the 10-3/4ths hours are in ink; is that right?

A. Right.

Q. What is the total number of hours indicated on the card for that pay period?

A. 38-3/4ths hours.

Q. Looking again at the personnel payroll record of Mr. Marra, are there any entries there for the payroll periods after the period ending October 16?

A. There are no entries except the totals on the bottom of the page for the quarter and the year.

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Q. (By Mr. Berke): Where the pencilled notation in the "In" column for October 15 on Mr. Marra's time card indicates "12," is that your understanding that is 12 midnight?

A. Correct.

Q. Pardon?

A. It does.

Q. And "SA" in the column to the left of the numeral indicating 11:00 o'clock, what do they stand for?

A. Saturday.

Q. That indicates that he punched out on Saturday at 11:00 o'clock, does it?

A. Yes. 11:00 in the morning.

Q. Now you have handed me the personnel payroll record and time card for Charles Pozzi; is that correct?

A. Correct.

Q. Is it correct that the personnel payroll record indicates date employed 9-27-54?

A. It does.

(Testimony of Errol David Wilson.)

Q. And date terminated 10-15? A. It does.

Q. And is it also correct that that record contains entries [2761] for the payroll periods in the month of October ending October 2, October 9, and October 16? A. It does.

Q. Looking at Mr. Pozzi's time card for the payroll period ending October 16, 1954, is it correct that it contains the notation that he worked on the night shift? A. It does.

Q. Will you turn to the October 15 entries on that card and tell us what they show?

A. Friday, October 15, checked in at 3:55, p.m. The next column "Out" in pencil is written one-half. The out time at the end of shift, Saturday, 1:38, a.m. Worked $9\frac{1}{4}$ hours.

Q. And does it show the total number of hours worked by Mr. Pozzi for that period?

A. 46-3/4ths.

Q. Do you know what that one-half that is in pencil stands for?

A. It was a practice on a few employees whose time might vary and conditions might be such they couldn't go off at the regular shift, took their time, and were allowed a half hour. And that indicates a half hour to be deducted for the lunch period or meal period.

Q. Going back to Mr. Pozzi's personnel payroll record, are there any entries thereon for payroll periods after the payroll period ending October 16?

A. There are none, except the total at the bottom of the page.

(Testimony of Errol David Wilson.)

Q. Now you have handed me the payroll record and time card for Gerald Rogers; is that correct?

A. That is correct.

Q. And is it correct that the payroll record indicates date employed 9-29-54? A. It does.

Q. And date terminated is indicated in ink, 10-15? A. It does.

Q. Is it also correct that the payroll record contains entries for payroll periods in October, 1954, ending on October 2, October 9, and October 16?

A. It does.

Q. Now turning to Mr. Rogers' time card for the pay period ending October 16, 1954, is it correct that it indicates he worked the night shift?

A. It does.

Q. Will you go to the entries for October 15 and tell us what they show?

A. Friday, October 15, checked in 4:00, p.m.; checked in after meal period 8:26, p.m.; checked out at end of shift, Saturday, 1:19, a.m.; worked 8-3/4ths hours.

Q. Incidentally, how is Saturday indicated on there; it is punched on there, is it not, by the clock?

A. It is punched on by the clock, the symbol, "SA." [2763]

Q. Now what are the total number of hours indicated on the time card worked on that period by Mr. Rogers? A. 42-3/4ths.

Q. And looking at the personnel payroll record again for Mr. Rogers, is it correct that there are

(Testimony of Errol David Wilson.)

no entries for payroll periods after the payroll period ending October 16, 1954?

A. That is correct. There are no entries except the total at the bottom of the page. [2764]

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Q. (By Mr. Berke): Mr. Wilson, have you the personnel payroll record and the time cards for the payroll period ending [2769] October 16 and October 23 for Oma Bridges? A. I have.

Q. Now is it correct that the personnel payroll record shows she was employed in July, '54?

A. July 28, '54; it does.

Q. Mr. Wilson, is it correct that the personnel payroll record of Oma Bridges shows employment during the payroll period ending October 16, 1954?

A. It does.

Q. And it shows the time worked 40 $\frac{1}{4}$ hours?

A. It does.

Q. And will you tell us what it shows as to amount of wages paid?

A. Period ending October 16, 1954, worked 40 $\frac{1}{4}$ hours; gross pay, \$38.36; check No. 377 in the amount of \$34.91 was issued. And there is a notation, "mailed."

Q. Now looking at her time card for the pay period ending October 16, is it correct that it shows the last day worked October 15? A. It does.

Q. And how many hours for that day?

A. Eight and one-quarter hours.

Q. Now does the personnel payroll record for her also show employment during the payroll pe-

(Testimony of Errol David Wilson.)

riod ending October 23? A. It does. [2770]

Q. And will you tell us the number of hours and the wages paid as indicated there?

A. Period ending October 23, 1954, 32 hours, gross pay \$32.00; check No. 528 issued in the amount of \$29.84.

Q. Now looking at the time card for the pay period ending October 23 for Oma Bridges, what does that show with respect to the first day she worked in that period?

A. She checked in on Wednesday, the 20th, that is October 20, at 8:00, a.m. She returned from her meal period at 12:24, p.m. Checked out at end of shift 4:30, p.m. Worked eight hours.

Q. Now is her time recorded on that card for each of the succeeding days to and including Saturday, October 23? A. There are.

Q. And how many hours does it show she worked that pay period?

A. Thirty-two hours.

Q. Now does her personnel payroll record show employment in the succeeding payroll periods to and including the payroll period ending December 11, 1954? A. It does. [2771]

* * * * *

Q. (By Mr. Berke): You have here the payroll record and time card for Marie Collins; is that correct? A. Correct.

Q. Is it correct that the personnel payroll record shows she was employed on September 28, '54?

A. It does.

(Testimony of Errol David Wilson.)

Q. Turning again to the personnel payroll record for her, does it contain an entry showing employment during the payroll period ending October 16, 1954? A. It does.

Q. Does it contain entries showing employment during the payroll period ending October 23, 1954?

A. It does.

Q. Now will you tell us what both those entries show with respect to number of hours worked and wages paid?

A. Period ending October 16, 1954, worked $40\frac{1}{4}$ hours; gross pay \$38.36; check No. 253 in amount of \$34.91 issued. Notation, "Mailed check."

Period ending October 23, 1954, worked 32 hours; gross pay \$32.00; check No. 2984 — Correction, please — check No. 541 in the amount of \$29.84 issued.

Q. Now turning to the time card for the pay period ending October 16, 1954, for Marie Collins, is it correct that it shows the last date worked during that period was October 15, 1954?

A. It does.

Q. And does it show how many hours were worked that day? A. It does— $8\frac{1}{4}$.

Q. And how many hours altogether during that pay period does it show? A. $40\frac{1}{4}$.

Q. Turning to her time card for the pay period ending October 23, 1954, what is the date of the first entry showing employment [2773] during that period? A. October 20, 1954.

Q. Now going again to Marie Collins' person-

(Testimony of Errol David Wilson.)

nel payroll record, does it show continuous employment from and after the pay period ending October 23, 1954, to and including the payroll period ending December 11, 1954? A. It does. [2774]

* * * * *

Q. (By Mr. Berke): Have you got the personnel payroll record and time cards for Pastoria Hall? A. Yes.

Q. Is it correct that her personnel payroll record shows date of employment July 26, 1954?

A. It does.

Q. Mr. Wilson, as you have testified, the personnel payroll record shows date employed July 26, 1954; is that correct?

A. That is correct.

Q. Now looking on the payroll record, is it correct that the first entry is for the payroll period ending July 24, 1954? A. It is.

Q. Showing 33½ hours worked during that payroll period; correct? A. It is.

Q. Now does this payroll record contain an entry showing employment during the period ending October 16, 1954? A. It does.

Q. And how many hours are indicated on there for that period? [2775]

A. Forty and a half.

Q. Does it also show entries for the payroll period ending October 23, 1954? A. It does.

Q. How many hours are indicated as having been worked during that period?

A. Forty-eight hours.

(Testimony of Errol David Wilson.)

Q. Will you read the amount of wages paid for each of those periods?

A. Period ending October 16, 1954, gross wages \$38.72; check No. 261 was issued in the amount of \$35.26. Notation that the check was mailed.

Period ending October 23, 1954, gross pay, \$48.00; check No. 573 was issued in the amount of \$42.46.

Q. Going to Pastoria Hall's time card for the pay period ending October 16, 1954, is it correct that it shows the last day worked during that period as being October 15, 1954? A. It does.

Q. How many hours worked on that day?

A. Eight and one-half hours.

Q. And total number of hours for that period?

A. Forty and one-half.

Q. Turning to the time card for the pay period ending October 23, 1954, for her, what does it show with respect to the first day of work during that period? [2776]

A. Shows that she worked Monday, October 18, 1954, eight hours.

Q. And the total number of hours worked during that period? A. Forty-eight hours.

Q. Now is it correct that the personnel payroll record for Pastoria Hall shows continuous employment after the pay period ending October 16, 1954, to and including the payroll period ending December 11, 1954? A. It does.

Q. Do you have the personnel payroll record for Anna Hance and the time card for the pay period ending October 16, 1954? A. I have.

(Testimony of Errol David Wilson.)

Q. Now there isn't any time card here for the payroll period ending October 30, is there?

A. No, there is not.

Q. Is that available?

Trial Examiner: You mean the 23rd or 30th?

Mr. Berke: No, the 30th.

Q. (By Mr. Berke): Is that available?

A. If it hasn't been clipped and lost.

Q. What you mean is you didn't previously clip it, take it out and clip it to the personnel payroll record? A. That I am not positive.

Q. Now is it correct that the personnel payroll record for Anna Hance shows date employed July 22, 1954? [2777]

A. It does.

Q. Does it also show employment during the payroll period ending October 16, 1954?

A. It does.

Q. And then is it correct that the fourth line in the column, immediately below the payroll period entries for October 16, 1954, is blank?

A. It is.

Q. And the next entry is on Line 5 for the payroll period ending October 30, 1954?

A. It is.

Q. Will you please tell us what the entries are for both those periods, October 16 and October 30?

A. Period ending October 16, 1954, 36 hours worked; gross pay \$34.20; check No. 238 issued in the amount of \$33.18, with the notation, "Check mailed."

(Testimony of Errol David Wilson.)

Period ending October 30, 1954, hours worked 8; gross pay \$8.00; check No. 796 in the amount of \$7.76 issued.

Q. Now turning to the time card for Anna Hance for the payroll period ending October 16, 1954, is it correct it shows the last day of employment thereon as October 15? A. It does.

Q. And how many hours does it show?

A. Four hours.

Q. And how many hours does it show all told in that period? [2778]

A. Thirty-six hours.

Q. Now there is a notation in pencil on the bottom, "Pd 10/15/54"; is that correct?

A. Correct.

Q. There is also a notation at the top, "Quit"; is that correct? A. Correct.

Q. In pencil. Now is it also correct that her personnel payroll record shows continuous employment starting with the payroll period ending October 30, 1954, to and including the payroll period ending December 11, 1954? A. It does.

Trial Examiner: When you say, "continuous employment," do you mean each day of the whole period, or do you mean each week?

Mr. Berke: No. Each pay period is what I am referring to.

* * * * *

Q. (By Mr. Berke): Do you have the payroll record here of Theresa Hofland? A. I have.

Q. Is it correct that it shows date employed

(Testimony of Errol David Wilson.)

9/13/54? A. It does.

Q. Do you also have the time card for Theresa Hofland for the [2779] pay periods ending October 16 and October 23, 1954? A. I have.

Q. Does the personnel payroll record for Theresa Hofland show employment during the payroll periods ending October 16, 1954, and the payroll period ending October 23, 1954? A. It does.

Q. Will you read what it shows with respect to hours and wages, please, for the periods?

A. Payroll period ending October 23,—Question, will you repeat his question to me?

(Question read.)

Mr. Berke: For those periods.

A. (Continuing) Period ending October 16, 1954, worked 40 hours; gross earnings, \$40.00; check No. 351 issued in the amount of \$32.70. Notation, "Mailed check."

Period ending October 23, 1954, worked 48 hours; gross pay \$48.00; check No. 582 in the amount of \$37.86 issued.

Q. Will you look at Theresa Hofland's time card for the pay period ending October 16, 1954, and tell us whether it is correct that it shows the last day worked during that period as being October 15, 1954? A. It does.

Q. And the number of hours worked that day? A. Eight hours.

Q. Total number of hours worked during that period as indicated [2780] on that card?

A. Forty hours.

(Testimony of Errol David Wilson.)

Q. Looking at her time card for the pay period ending October 23, 1954, what does it show with respect to the first day she worked during that period?

A. Shows that she checked in on October 16—Beg pardon—October 18, Monday, 8:00 o'clock. That is written in in pencil with initial to the left of it, "H".

She returned from her meal period per the time clock at 12:52 p.m.; checked out at the end of the shift at 5:01 p.m.; worked eight hours.

Q. How many hours does the card indicate she worked that pay period? A. Forty-eight hours.

Q. Now turning again to Theresa Hofland's personnel payroll record, is it correct that it shows continuous employment commencing with the pay period ending October 23, 1954, to and including the pay period ending December 11, 1954?

A. It does.

Trial Examiner: Will you read me that question?

(Question read.)

Q. (By Mr. Berke): Do you have the personnel payroll record and the time card for pay periods of October 16 and October 23 for Alice McCullough? A. I have. [2781]

Q. Is it correct that the personnel payroll records for her show date employed 9/28/54?

A. It does.

Q. Looking at Alice McCullough's personnel payroll record, is it correct there are entries show-

(Testimony of Errol David Wilson.)

ing that she worked during the payroll periods ending October 16, 1954, and October 23, 1954?

A. There are.

Q. Will you please read what the entries show with respect to those two periods?

A. Period ending October 16, 1954, worked 24 $\frac{1}{4}$ hours; gross earnings, \$23.16; check No. 276 issued in the amount of \$22.47; notation, "Mailed check."

October 23, the period ending October 23, 1954, worked 24 hours; gross pay, \$24.00; check No. 601 in the amount of \$23.28 issued.

Q. Now looking at her time card for the pay period ending October 16, 1954, is it correct that the last entry thereon is for October 15, 1954?

A. It is.

Q. And how many hours does it show worked that day?

A. Eight and one-quarter hours.

Q. How many hours does it show worked for that entire pay period? A. 24 $\frac{1}{4}$ hours.

Q. Is it correct that it indicates Thursday and Wednesday as not having been worked during that period? A. It so indicates.

Q. Turning to her time card for the pay period ending October 23, 1954, what does it show with respect to the first day she worked during that period?

A. Shows that she punched in Wednesday, October 20, at 8:00 a.m.; returned from lunch period

(Testimony of Errol David Wilson.)

12:26 p.m.; checked out at end of shift 4:30 p.m.; worked eight hours.

Q. And how many hours does it show she worked altogether during that period?

A. Twenty-four hours.

Q. Now is it correct that her personnel payroll record shows continuous employment from the pay period ending October 23, 1954, through and including the pay period ending December 11, 1954?

A. It does.

Q. Now the personnel payroll record contains a notation, does it not, in the column in which entries are made for the payroll period ending November 6, 1954, that check 1002 in the amount of \$23.28 was mailed to her on 11-10?

A. It carries that notation.

Q. Is it correct that the payroll record shows entries for the period ending December 4, 1954, that check No. 1522 in the amount of \$23.28 was mailed to her on 12/2? [2783] A. Right.

Q. Now have you the personnel payroll record and the time cards for the pay period ending October 16 and October 30, 1954, for Norma Morien?

A. I have.

Q. And is it correct that her personnel payroll record shows date employed 10/7/54?

A. It is.

* * * * *

Q. (By Mr. Berke): Now looking again at Norma Morien's payroll record, is it correct that it contains an entry for the payroll period ending

(Testimony of Errol David Wilson.)

October 16, 1954, and an entry for the payroll period ending October 30, 1954? A. It does.

Q. Is it correct that there is no entry for the payroll period ending October 23, 1954; and on Line 4 on the record—and that Line 4 on the record is blank? A. It is.

Q. Now will you read into the record what it shows with respect to the payroll periods ending October 16 and October 30?

A. Period ending October 16, 1954, 32½ hours; gross pay, \$32.50; check No. 358 in the amount of \$29.67 issued; the notation, "Mailed check." [2784]

Period ending October 30, 1954, worked 47 hours; gross pay, \$47.00; check No. 834 in the amount of \$37.74 issued.

Q. Now turning to her time card for the pay period ending October 16, 1954, is it correct that it shows the last day worked or time punched in as being October 15, 1954? A. It does.

Q. And how much time does it show worked for that particular day? A. One-half hour.

Q. And what is the total number of hours for that period as shown on the card? A. 32½.

Q. Turning to her time card for the pay period ending October 30, 1954, what does it show with respect to the first day worked during that period?

A. Shows that she checked in, reported in, checked in for work, Monday, October 25, at 7:55 a.m.; returned from meal period 12:50 p.m.; checked out at end of shift 5:02 p.m.; worked eight hours.

(Testimony of Errol David Wilson.)

Q. And total number of hours worked during that pay period as indicated on the card?

A. Forty-seven hours.

Q. Now looking again at her payroll record, is it correct that it shows entries for pay periods, or continuous employment commencing with the pay period ending October 30, to and [2785] including the pay period ending December 11, 1954?

A. It does.

Q. Now have you here the payroll record and time cards for the periods ending October 16 and October 23, 1954, for Etta Urton? A. I have.

Q. Is it correct that the payroll record shows date employed July 20, 1954? A. It does.

* * * * *

Q. (By Mr. Berke): Looking at Etta Urton's personnel payroll record, is it correct that it shows entries for the payroll period ending October 16, 1954, and October 23, 1954? A. It does.

Q. Will you please read what those entries are?

A. Period ending October 16, 1954, worked 32 $\frac{1}{4}$ hours; gross earnings, \$30.76; check No. 296 issued for \$26.73, with the [2786] notation, "Mailed check."

Payroll period ending October 23, 1954, worked 48 hours; gross pay \$48.00; check No. 640 in the amount of \$36.21 issued.

Q. Will you look at her time card for the pay period ending October 16, 1954, and is it correct that the last entry thereon is for October 15?

A. It is.

(Testimony of Errol David Wilson.)

Q. And the number of hours worked that day is indicated as being what?

A. Eight and one-quarter hours.

Q. Total number of hours worked that period?

A. 32 $\frac{1}{4}$ hours.

Q. Is it correct that for Thursday, October 14, there are no entries and that line is blank?

A. That is true.

Q. Will you look at her time card for the pay period ending October 23, 1954, and tell us what the entries show with respect to the first day of employment during that period?

A. Checked in Monday, October 18, 10:00 a.m.; checked in from meal period 12:56 p.m.; checked out at end of shift 5:06 p.m.; worked eight hours.

Q. Total number of hours worked during that period is indicated thereon as being what?

A. 48 hours.

Trial Examiner: May I see that a moment?

Q. (By Mr. Berke): Now is it correct that the payroll record shows continuous employment from the pay period ending October 23, to and including the pay period ending December 11, 1954?

A. It does.

* * * * *

Q. (By Mr. Berke): Do you have the payroll record and time [2788] card for the pay period ending October 16, and pay period ending October 23, 1954, of Stella Vessels? A. I have.

Q. Is it correct that it shows date of employment 9/17? A. It does.

* * * * *

(Testimony of Errol David Wilson.)

Q. (By Mr. Berke): Is it correct that her personnel payroll record shows entries for the payroll periods ending October 16 and October 23, 1954?

A. It does.

Q. Will you please read what those entries show?

A. Period ending October 16, 1954, worked 21 hours; gross pay, \$19.95; check No. 298 in the amount of \$15.85 issued; the notation, "Mailed check."

Period ending October 23, 1954, \$40.00—Correction, 40 hours; gross pay, \$40.00; check No. 642 in the amount of \$31.50 issued.

Q. Now looking at her time card for the pay period ending October 16, 1954, what does it show was the last day worked thereon?

A. October 13, Wednesday.

Q. And the total number of hours worked during that pay period? A. 21 hours. [2789]

Q. Now, turning to her time card for the pay period ending October 23, 1954, what does it show with respect to the first day worked during that period?

A. Checked in Tuesday, October 19, 7:53 a.m.; checked back from meal period 12:26 p.m.; time clock punched out at end of shift Tuesday, 3:32 p.m. That has a line drawn through it in pencil and following it is written in pencil, "4:30"; worked eight hours.

Q. Total number of hours worked during that payroll period is indicated on that card as being

(Testimony of Errol David Wilson.)

what? A. Forty hours.

Q. Now looking again at her personnel payroll record, is it correct that it shows continuous employment commencing with the payroll period ending October 23, to and including the payroll period ending December 11, 1954?

A. There is an accounting for each week during that period. On Line 7, the period ending is indicated as November 16.

Q. Number of hours worked in that period is indicated as being what?

A. 48 hours. There is no entry for the week ending November 13.

Q. When you say there is no——

A. (continuing) Which would indicate that there was an error in making the entry of the date or the period ending.

Q. And there are entries, are there, for the succeeding payroll [2790] periods to and including December 11, 1954? A. There are. [2791]

* * * * *

Q. (By Mr. Berke): We already have on the record some of the information that appears on the payroll record and the time card, Mr. Wilson, so I will ask you, looking at the personnel payroll record of Edyth Wasin, is it correct that it contains entries showing employment from the pay period ending October 23 continuously to and including December 11, 1954? In addition to showing employment for the payroll period ending October 16, 1954? A. It does. [2793]

* * * * *

(Testimony of Errol David Wilson.)

Q. (By Mr. Berke): Yesterday you testified, Mr. Wilson, with respect to the payroll record and time card of Marcia Freyling; do you remember that? A. Yes.

Q. And one of the time cards did not have a date, a pay period ending date on it. Have you since checked your records to determine from where you took that card?

A. From the payroll period ending October 16.
* * * * * [2794]

Q. (By Mr. Berke): Now, Mr. Wilson, with respect to Stella Vessels, her personnel payroll record showed on Line 7, you recall, a date for payroll period ending as being November 16; is that correct? A. That is correct.

Q. Now have you brought here the time card of Stella Vessels for the pay period ending after the pay period that ended on November the 6th?

A. I have.

Q. Now what date does the time card that you have just handed me bear for the pay ending period? A. November 13, 1954.

Q. And does that bear job No. 7101?

A. It does.

Q. And the name "Vessels, Stella" appears thereon? A. It does. [2795]

Q. And what day does it show for the beginning of employment during that pay period?

A. Monday, November 9.

Q. And——

(Testimony of Errol David Wilson.)

A. (Continuing) Beg pardon. That would be November 8.

Q. Monday, November 8? A. 8.

Q. What does it show for the last day worked during that pay period?

A. Saturday, November 13.

Q. And how many hours all told does it show she worked during that pay period?

A. 48 hours.

Q. And is that the same number of hours that appears on the personnel payroll record of Stella Vessels for the period recorded there on Line 7 as November 16, 1954? A. It does.

Q. Now you produced since the noon recess the time card of Anna Hance for the pay period ending October 30, 1954; have you? A. I have.

Q. Now you previously testified, Mr. Wilson, that Anna Hance's payroll records shows that she worked during the payroll period ending October 16, 1954, and that the next line on that record is blank, and that the succeeding line, Line 5, shows she worked during the pay period ending October 30, 1954, for a total of eight hours; is that correct?

A. Correct.

Q. Will you look at the time card for the pay period ending October 30, 1954, and tell us what it contains thereon as to the day worked within that period?

A. October 30, Saturday, punched in 7:58 a.m.; returned from meal period at 12:25 p.m.; punched out at end of shift 4:31 p.m.; worked eight hours.

(Testimony of Errol David Wilson.)

Q. And are there any other entries thereon as to days worked during that period?

A. There are none.

Q. And what is the total number of hours indicated on the card for that period? A. Eight.

* * * * * [2797]

Q. (By Mr. Berke): Mr. Wilson, do you recall a meeting of the employees that was held in the warehouse at the Company premises on Molino, October 15, 1954? A. I do.

Q. Do you recall an employee by the name of Gloria Pate? A. I do.

Q. Was there an incident that occurred with respect to Gloria Pate and yourself that day?

A. There was.

Q. And tell us whether it was before or during or after that meeting?

A. It was after the meeting. [2798]

* * * * *

Q. (By Mr. Berke): Was it immediately after that meeting, or was there some time that had elapsed after the meeting, as near as you recall?

A. It was very shortly after the meeting, maybe five, ten minutes.

Q. And where were you at the time?

A. In the areaway I'd say, approximately half way between the cannery and the warehouse where the meeting was being held.

Q. Was this a conversation or what was it between Gloria Pate and yourself?

A. Well,—

(Testimony of Errol David Wilson.)

Q. Was it a conversation or something else?
Just——

A. Guess I would call it a conversation. She came up and asked me a question.

Q. Was anyone else present besides you and Gloria Pate? A. No.

Q. Will you please tell us what was said and identify who was speaking?

A. A little girl came up, crippled girl came up to me immediately or shortly after the meeting and asked me why her name wasn't on the list to go to work next week.

And I told her that I knew nothing about the list or who was to be employed and that she would have to see Mr. Duckworth at the cannery. [2799]

Q. Was there any more said between you?

A. Nothing more said.

Q. Did she do anything after that?

A. She turned around and walked away, and I don't know where she went after that.

Q. Now did you know her name at the time she came up to you? A. I did not.

Q. Did you later learn her name?

A. Yes. I asked either the foreman or floor-lady right afterwards to, pointed her out and asked her who it was.

Q. You say you pointed her out and you were told—— A. Told her name was Gloria Pate.

* * * * * [2800]

Redirect Examination * * * * *

Q. (By Mr. Berke): Now, have you produced

(Testimony of Errol David Wilson.)

here at my request the time card for the pay period ending September 25, 1954, of Clarence Storey? A. I have.

(Thereupon the document above referred to was marked Respondent's Exhibit No. 21 for identification.) [2943]

* * * * *

Trial Examiner: O.K.

Respondent's Exhibit 21 is received in evidence, and permission is granted to withdraw the original and substitute photostatic copy.

I would like to request, however, that when you return the photostatic copy you return the original so we can make comparisons. I want to see whether or not the pencil notations show up.

Mr. Berke: I will be glad to do that.

(The document heretofore marked Respondent's Exhibit No. 21 for identification was received in evidence.) [2945]

* * * * *

Q. (By Trial Examiner): Now, you have brought in some of the payroll personnel records in response to a request by me, have you?

A. I have.

Trial Examiner: I might state at the outset that one reason I have asked for these is because the record does not indicate the last date worked by the employee, and an inference might be drawn that they were terminated on October 15, and there is reason to believe from other evidence in the

(Testimony of Errol David Wilson.)

record that they might have continued. So that is why I wanted to [2961] clear that up.

Q. (By Trial Examiner): The first one is Isabelle Ameral. First, will you tell me whether or not from looking at the record Isabelle Ameral worked on the night of October 15?

* * * * *

The Witness: She did not.

Q. (Trial Examiner): Excuse me. She was on the day shift. A. She was on the day shift.

Q. That is right. But she worked on the day shift? A. She worked on the day shift, yes.

Q. And what is the next date that she worked?

A. Monday, October 18.

Q. And did she also work on Tuesday, October 19? A. She did.

Q. I should say, "Do the records show that time was punched in for her?"

Mr. Berke: We will assume what you had reference to is what the time card shows, and he is answering from the time [2962] card, since he is holding them in his hand.

Q. (By Trial Examiner): Now, will you tell me whether or not employment continued through the season thereafter?

A. It continued on through the season, to the week ending December 11, 1954.

Q. Without interruption?

A. Without interruption.

Q. Now, will you go through the same routine with Beulah Cassidy?

(Testimony of Errol David Wilson.)

A. Beulah Cassiday worked October 15, 1954, on the night shift. She reported for work Monday morning, October 18; she worked——

Mr. Berke: The Trial Examiner said to go through the same routine. He asked about the 19th previously.

The Witness: She worked the 19th, I believe that was the only two days in the work you asked about.

Trial Examiner: That is all. And whether or not her employment was continuous thereafter.

The Witness: Her employment was continuous from the week ending October 23, 1954, through the week ending December 11, 1954. [2963]

* * * * *

Q. (By Trial Examiner): When I asked whether or not their employment was continuous, Mr. Wilson, I meant whether or not they worked each week during the balance of the season, even though some of the weeks might have been less than a full week.

When I finish with all of these, I am going to ask you to tell me for how many of these that I asked you about there appears on their personnel payroll record hours less than the full number for any given week. But I would like to do that all at once.

Will you do the same thing now with Connie Jones. Is that her correct name?

A. The name shown on the personnel payroll

(Testimony of Errol David Wilson.)

record is Cornelia Jones. Her time cards were made as Connie Jones.

She worked Friday, October 15, on the night shift; she reported back for work Monday, October 18; worked again Tuesday, October 19. The payroll record indicates she worked on through the week ending December 11, 1954, without interruption.

Q. Was there anything on the time card or personnel payroll record to indicate any termination of employment or re-hiring?

A. Nothing at all, Mr. Examiner.

Q. Now, will you tell me what the records show with respect to Barbara Mizell, M-i-z-e-l-l. [2964]

A. Barbara Mizell worked Wednesday, October 13, on the night shift, period for the payroll period ending October 16, 1954; worked one day that week—one night, rather.

Q. One night. Was she on the night shift?

A. She was on the night shift, yes.

Q. The records otherwise indicate her on the day shift. All right.

A. She returned to work Wednesday, October 20, and worked the shift, complete shift, on the day shift. She did not report for work on Monday or Tuesday.

The personnel payroll record shows that she had a pay period ending October 23 and again October 30, 1954, and that is the last entry shown on her record. [2965]

* * * * *

(Testimony of Errol David Wilson.)

Trial Examiner: Read them off. Start from the beginning.

The Witness: The period ending September 4, 1954, 37 hours.

September 11, 34½ hours;

September 18, 36½ hours;

September 25, 36 hours;

October 2, 36 hours;

October 9, 28¾ hours;

October 16, 8 hours;

October 23, 24 hours;

October 30, 31¾ hours.

* * * * *

Q. (By Trial Examiner): Will you state what the personnel payroll record and time card for Betty Monroe indicates?

A. The time card for the week ending October 16, for Betty [2966] Monroe, indicates that she punched in at 3:54 on Friday, October 15, and there is no other punch, indicating that she did not work out the shift. The time credited to her for that day—October 15—is one-half hour. The total for the week is 30½ hours, and the last entry on the personnel payroll record indicates 30½ hours worked for the week ending October 16.

Q. That states the date of her employment, too, doesn't it?

A. October 10, 1954, which evidently is an error in typing, because she actually worked—or had a payroll period on October 9, 21 hours.

Q. October 9 would be Saturday?

A. Yes.

(Testimony of Errol David Wilson.)

Q. For the payroll period——

A. Ending October, 9.

Q. So you say she must have been hired about the 6th?

A. It would have been approximately three days prior to October 9. [2967]

* * * * *

Q. I hand you the personnel payroll record, or sheet and time card, for Carl Loeffler and ask you to state what that indicates.

A. The time card for the pay period ending October 16, 1954, shows that he worked $4\frac{1}{4}$ hours the morning of Saturday, October 16. The time card for the pay period ending October 23, 1954, shows that he worked $2\frac{1}{4}$ hours Monday, October 18.

The personnel payroll record for the period ending October 23, 1954, shows $2\frac{1}{4}$ hours for that period, and that is the last entry on the record.

Q. There are notations on the time card for both the week of the 16th and the week of the 23rd, in pencil with "O.K. S.S." in the left-hand margin, and I believe you have already identified "S.S" as standing for Steve Struempf.

A. Steve Struempf.

Q. Will you read what is noted in pencil at the top of the card for October 23, and then I will ask you another question.

A. On the card for the period ending October 23, 1954, there is a pencil notation, "quit, 10/18/

(Testimony of Errol David Wilson.)

54." The "18" is written over something else; I can't make it out.

Q. And will you look at the personnel payroll record and tell me whether that indicates the date of termination of employment?

A. After "date terminated", at the head of the sheet, there is the date "10-18". [2971]

* * * * *

Q. I hand you the personnel payroll record sheet and time cards for Eugene E. Elmore, and ask you to state what they show with respect to whether or not he was credited with any time during the weeks of October 16 and 23?

A. I have no card here for either one of those weeks, and there is no entry on the personnel payroll record showing any earning for those two weeks.

Q. What does the personnel payroll record show with regard to the state of his employment before and after those periods?

A. By "state of employment" do you mean whether he was off at periods and—— [2972]

Q. Yes. Did he have time shown for him before and after?

A. Yes, he did—both before and after—quite erratic. He worked short weeks sometimes, wouldn't be there for two or three weeks at a time. He returned and worked 30 hours on the—during the period ending October 30, 1954, and that was the final entry on his record.

Q. He did not work after October 30?

(Testimony of Errol David Wilson.)

A. He did not.

* * * * *

Q. (By Trial Examiner): I hand you the personnel payroll record and time card for Sanda Loeffler, and ask you to state what that shows with regard to her employment record.

A. Sanda Loeffler's time card for the pay period ending October 2, 1954, shows that she worked Saturday, October 2, for five hours. [2973]

On the personnel payroll record, payroll period ending October 7, shows five hours for that week, and that is the last entry on the record.

Q. Did you say "7th" or "2nd"?

A. "2nd".

Q. Will you read what is shown on the personnel payroll record at the top with regard to "termination of employment" and "reason"?

A. Date terminated: 10/2; reason: quit.

Q. That is shown in type or ink or pencil?

A. The date and the word "quit" are shown in ink.

Q. I hand you the time cards and personnel payroll records for Rosette Reynolds, and ask you to state what that shows, with regard to the time put in by her during the week ending October 16, and 23, and thereafter, if any.

A. Rosette Reynolds' time card for pay period ending October 16, 1954, shows that she worked Friday, October 15, but did not work Saturday.

The time card for the same person for the period ending October 23, 1954, shows that she reported

(Testimony of Errol David Wilson.)

for work Monday, October 18, and worked five hours.

That is the entire time for that week—the period ending October 23, 1954.

The personnel payroll record shows for the period ending October 16, 1954, she worked 51½ hours, and for the period [2974] ending October 23, 1954, she worked five hours. [2975]

* * * * *

Redirect Examination * * * * *

Q. (By Mr. Berke): Mr. Wilson, I hold here the personnel payroll record and the time card for the pay period ending October 16, 1954, of Eleanor Bertozzi, B-e-r-t-o-z-z-i, which were taken from the records and files of the company, were they not?

A. They were.

Q. Now, at the top of this time card there is certain [3010] information which appears in pencil, does it not? A. It does.

Q. And among other things there appears thereon "October 15"; is that correct?

A. That is correct.

Q. Now, looking at the time card, is it correct that it shows that she worked four days during that period? A. It does.

Q. Starting with Monday and going through Thursday of that particular week; is that correct?

A. It is correct.

Q. Now, are there any entries for Friday, October 15, on that card?

(Testimony of Errol David Wilson.)

A. None, except the punchout time on Thursday, at the end of the shift.

Q. You mean Friday, 12:33? A. 12:33.

Q. A.M.? A. Yes.

Q. But for the shift beginning Friday—By the way, does the card show she worked night shift?

A. It does.

Q. For the shift beginning Friday evening, carrying over to Saturday morning, is there any entry at all? A. There is not. [3011]

Q. Now, what is the total number of hours shown on the card she worked that week?

A. 32 hours.

Q. And is it correct it does show she worked eight hours in each of the four days that appear thereon? A. It does.

Q. Now, looking at Eleanor Bertozzi's personnel payroll card, is it correct that it contains an entry for the pay period ending October 16, 1954?

A. Yes.

Q. And is it correct that it shows for that period 32 hours? A. It does.

Q. And what does it show with respect to the amount earned and paid?

A. Gross pay \$32; net pay \$25.14. Check No. 332, with the notation "mail check". [3012]

* * * * *

ALFRED W. COOK

a witness called by and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

* * * * *

Direct Examination

Q. (By Mr. Berke): Mr. Cook, what is your occupation? [3017]

A. Supervising agriculture inspector for Sonoma County.

Q. And how long have you had that position?

A. As an agricultural inspector, since July 5, 1949.

Q. And as a supervising agriculture inspector for how long? A. Approximately three years.

Q. And do you have any people working under you—you supervise? A. Yes.

Q. And what are their job titles?

A. Season apple inspectors, primarily.

Q. And how many such people do you have under you?

A. From 10 to 15, depending on the crop.

Q. On what, sir?

A. Depending on the crop.

Q. Now, will you tell us what your duties are as supervising apple inspector—I am sorry—supervising agriculture inspector for Sonoma County?

A. As supervising apple inspector, supervising inspector as you might put it, are to oversee primarily the apple inspection previous to the time of the harvest, as making surveys, supervising the inspection of the detail during the apple packing

(Testimony of Alfred W. Cook.)

season, assembling records after the apple season is over.

Q. And do those duties take in the apples that are grown in the so-called Sebastopol area?

A. Yes. [3018]

Q. By the way, can you tell us what the Sebastopol area consist of? I mean in terms of mileage, or its width and length.

A. It would be rough.

Q. Well, approximately.

A. Roughly, 15 miles long and probably 12 miles wide.

Q. Now, the duties that you have described, were those your duties in 1954? A. Yes.

Q. Did those duties take you personally into the orchards last year?

A. Yes, in the line of issuing of permits for injurious spray materials, which is also included in my job. It is mandatory that I make surveys of the orchards to determine whether or not the poisonous materials can be used in that area.

Q. And can you tell us whether or not your duties last year took you into the apple packing plants?

A. Into all of the apple packing plants.

Q. Now, you say "all of the apple packing plants." Do you mean all of them in the Sebastopol area, or is it broader than that?

A. All in Sonoma County.

Q. Where are there apple packing plants in Sonoma County in addition to the Sebastopol area?

(Testimony of Alfred W. Cook.)

A. In 1954 there was one in Geyserville and two in Healdsburg, besides all of the packing houses in the Sebastopol area, which range as far as Forestville, Grayton and Sebastopol and south of Sebastopol.

Q. What would be your purpose, or what was your purpose last year in inspecting the apples in the packing plants or sheds?

A. To determine whether or not they conformed to the State standards, as set up by the Agriculture Code.

Q. For what purpose? To conform with standards for what purpose?

A. For fresh consumption.

Q. Now, are you familiar with the Sebastopol Apple Growers Union? A. Yes.

Q. Were you familiar with that organization in 1954? A. Yes.

Q. Did you visit their packing plant in 1954?

A. Yes, daily.

Q. Sir? A. Daily.

Q. How much time would you spend there daily?

A. That would have to be an average. From two to four hours a day.

Q. Now, why would you be out at SAGU packing plant daily for [3020] that period of time?

A. To supervise my inspectors I had working under me; to check the grade, whether it complied or whether it didn't.

Q. Did you check the grade yourself when you were out there? A. With my inspectors.

(Testimony of Alfred W. Cook.)

Q. Now, will you tell us what the requirements are you have mentioned here, to check to determine whether they met requirements or standards? Will you tell us what those are?

A. The standards for fresh consumption as set up for 1954 and are, in 1955, as prescribed in the Agriculture Code as "California Fancy". Does that answer your question?

Q. Is that the standard?

A. That is right.

Q. Well what would you have to do to determine whether the standard is met?

A. You make a thorough inspection of a given amount of boxes, as prescribed by the State, of each lot; a thorough inspection of the entire box.

Q. Now, how do you inspect it? What do you look for when you inspect it?

A. You look for the defects that are listed in the law.

Q. Such as what?

A. Such as worm damage; worms; water core; Baldwin spot; Jonathan spot; sunburn; sprayburn; limb rub; scab. There are numerous ones mentioned in the Code, but—bruises. [3021]

* * * * *

Q. (By Mr. Berke): Tell us whether or not you also look for bitter pit and russetting.

* * * * *

A. Definitely. I could give you—read you the list of the defects right out of the Code.

Q. (By Mr. Berke): Have you a copy of the

(Testimony of Alfred W. Cook.)

Code here? A. Yes, right here.

* * * * *

The Witness: Do you wish me to read them now?

Trial Examiner: Just the additional ones.

The Witness: I have them pretty well strewn around in here. I have already told you. [3022]

Decay; internal breakdown; broken skin; insect pests; sun scald; russeting; drouth spots; hail mark; frost injury; fly speck fungus; and other diseases.

Q. (By Mr. Berke): Now, while you were at the SAGU plant on your daily tour there last year, during the season of 1954, did you observe the condition of the apples that were at the packing plant at SAGU? A. Yes.

Q. Would you tell us what you observed?

A. It was an unusually hard season for grading out apples to make the Fancy grade, due to the fact of the extreme cull-out from sunburn or sun scald, cracking, a big percentage of the apples, even cracking them open.

* * * * *

Q. (By Mr. Berke): Mr. Cook, what do you mean by "cull-out"?

A. Percentagewise, a large percentage of the crop was affected [3023] from sunburn and sun scald that would not make the Fancy grade to the point that the machines had to be slowed down to give the help plenty of time to cull them out, or we would reject them.

* * * * *

(Testimony of Alfred W. Cook.)

Q. (By Mr. Berke): Now, when you refer to the machines had to slow down to give the help plenty of time to pick out the culls, what machines are you referring to—that is, whose are you referring to?

A. The entire apple industry's packing houses. All of them.

Q. Well, specifically confining yourself to SAGU, did you observe that as a fact at the SAGU operation last year? A. Yes, I did.

Q. Now, you have referred to sunburn and sun scald. What would cause apples to be sunburned or sun scalded?

A. Extreme heat in this case, which was incurred, as I [3024] remember it, the 19th and 20th of June, 1954; we had two extremely hot days at a very sensitive growing period of the apple crop.

Q. Now, when you talk about "at a very sensitive growing period of the apple crop", what do you mean by that?

A. The apple as being very tender and immature and not covered well by the leaves at that time, for protection.

Q. For protection from what?

A. From the sun.

Q. Now, on those two days, the 19th and 20th of June, did you visit the orchards, the apple orchards, that is, on those two days?

A. Many of them.

Q. And did you observe the effect that the sun was having on those two days upon the apples?

(Testimony of Alfred W. Cook.)

A. Yes, I did.

Q. And will you tell us what you saw, please?

Mr. Karasick: I object to that as being immaterial and irrelevant.

Trial Examiner: Overruled.

A. The exposed apples—the first indication from a sunburn is turning a brick red, and you could see what was happening to it. It was being burned from exposure—overheat.

Q. (By Mr. Berke): Well, describe the apples as you saw them on those two days. [3025]

* * * * *

A. The exposed portions of the apples that were exposed to the sun as turning to a brick red color. That is, the exposed apples that had no cover from foliage, from heat.

Q. (By Mr. Berke): And what, when an apple gets into that condition, what is it referred to under the standards that you have mentioned here?

A. Well, it is, to run for fresh consumption, it is referred to as a "cull".

Q. You have made reference a couple of times to percentage of culls, but have not stated the percentage. Do you know what the percentage of the apples in the Sebastopol area were culls last season?

* * * * *

A. I have no actual figures to say the exact percentage which went in for each defect of culls, but the estimate would [3026] be, on the basis of an overall estimate from the entire industry—

(Testimony of Alfred W. Cook.)

Q. All right.

A. ———which would be in excess of 50 per cent of the apple crop.

Q. Now, you made some reference here to some sort of report that is made up by the Sonoma County Department of Agriculture as part of your job.

A. That is right.

Q. What report is that?

A. That is the report that is required by the California Agricultural Code, that the Agricultural Commissioner of each county make an annual agricultural crop and acreage report, and evaluation report of the agricultural products grown within his county of which he has jurisdiction.

Q. And what happens to that report?

A. One copy must be mailed to the Director of Agriculture, also another copy to the Board of Supervisors, and also must be kept on record in the office, and any interested parties may pick that up by going into our office.

Q. Are those copies of those records made available to the public generally?

A. At any time.

* * * * * [3027]

Q. (By Mr. Berke): Mr. Cook, I show you a document marked Respondent's Exhibit 22 for identification, entitled "Agricultural Crop Report, 1954, Sonoma County Department of Agriculture"; is that the report you were referring to?

A. It is. [3028]

Q. And is this report, marked Respondent's Exhibit 22 for identification, available in the So-

(Testimony of Alfred W. Cook.)

Sonoma County Department of Agriculture office?

A. It is.

Q. And is it available to the public generally?

A. Yes, it is.

Q. And is this the report that you testified to previously that is furnished to the Board of Supervisors and the Director of the State Department of Agriculture? A. It is.

Mr. Berke: I offer it in evidence. [3029]

* * * * *

Trial Examiner: I think I will receive it, for what it is worth.

(The document heretofore marked Respondent's Exhibit No. 22 for identification was received in evidence.)

* * * * *

Q. I show you a document marked Respondent's Exhibit 23 for identification, entitled "Sonoma County Department of Agriculture, Agricultural Crop Report, 1953," and I will ask you if you have seen this document before today?

A. The same ones we put out.

Q. Now, you say "same ones (you) put out". Does that come from the office of the Sonoma County Department of Agriculture? [3031]

A. Yes.

Q. That is the office in which you are employed?

A. Yes.

Q. And Mr. Wright, whose name appears on

(Testimony of Alfred W. Cook.)

the inside in connection with the letter addressed to the Board of Supervisors, and the Director of the State Department of Agriculture, is that the same Mr. Wright whose name appears in Respondent's Exhibit No. 22? A. Yes, it is.

Q. Now, there are figures in here with respect to apples. Did you have anything to do with the compilation of those figures?

A. The same as the one that followed that one.

Q. Do I understand that you gathered the figures from the various packers, and assisted in compiling, along with Mr. Wright, as you have described, with respect to Respondent's Exhibit No. 22? A. I did.

Mr. Berke: I offer Respondent's Exhibit No. 23 in evidence. [3032]

* * * * *

(Thereupon, the document above referred to was marked Respondent's Exhibit No. 23 for identification and was received in evidence.)

* * * * * [3033]

Trial Examiner: All right. I will receive Respondent's Exhibit 24 in evidence.

(Thereupon, the document above referred to was marked Respondent's Exhibit No. 24 for identification and was received in evidence.)

* * * * * [3034]

ELIZABETH PERRY

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

* * * * *

Direct Examination

Q. (By Mr. Berke): Mrs. Perry, are you employed at the present time? A. Yes, I am.

Q. By whom are you employed?

A. The Bank of Sonoma County.

Q. And where? A. In Sebastopol.

Q. And how long have you been employed by that bank?

A. I have been employed there since, I believe, July 14 of 1951.

Q. And prior to that time were you employed elsewhere?

A. No, sir. Not since I have gone to the bank.

Q. Prior—before that?

A. Prior to that time—prior to that time I was employed by the Sebastopol Co-op Cannery. [3063]

Q. Part of that time, or prior?

A. Prior to that time.

Q. When did you first go to work for the Sebastopol Co-op Cannery?

A. I believe it was in the early part of August, 1949.

Q. And when did you last work there?

A. I think shortly after the 4th of July, or prior—anyway, we took a trip, and as soon as we came back I went to the bank.

Trial Examiner: What year?

(Testimony of Elizabeth Perry.)

The Witness: 1951. I just had about 10 days, I believe, between the time I left the cannery and the time that I went to the bank. I think I had about 10 days.

Q. (By Mr. Berke): Did—do you know about what month that was that you went to the bank?

A. Well, July.

Q. 1951? A. '51.

Q. When you worked for the Sebastopol Co-op Cannery, what was your position?

A. Bookkeeper and general office manager. In other words, I was the only one. I was bookkeeper and everything.

Q. And will you tell us what your duties were at that time, as bookkeeper?

A. My duties at that time were to take care of the whole [3064] set of books, and I checked sales tags and, well, just everything that is done in a small office like that that has only one person in it. I made notes to the growers when they became due, and renewed the notes, and did all that, anything. Of course, in a co-operative, then, you have a secretary and treasurer who sign all things.

Q. Did you make entries of moneys received by the Sebastopol Co-op Cannery?

A. I did. I made deposits with the bank. I think they will show in my handwriting.

Q. Now, tell us whether or not, among the entries that you made of moneys received by the Sebastopol Co-op Cannery, were any sums received for membership in the Sebastopol Co-op Cannery?

(Testimony of Elizabeth Perry.)

A. Oh, yes. There is a membership fee of \$5.

Q. Now, I hold here in my hand what, Mrs. Perry?

A. Well, that looks like the old ledger that we used to have there.

Q. And where did you get this from?

A. I got that from Mrs. Sollars, who is now the bookkeeper at the Sebastopol Co-op Cannery.

Q. When?

A. I just picked up that—whatever time it takes to drive over here. I picked it up on my way.

Q. Mrs. Perry, I show you here this ledger that you have [3065] just mentioned.

A. That is my writing all the way down.

Q. Now, I notice here is a page that I have turned to, No. 21, "Record of Cash Received, Month of January, 1951." Does it so read at the top of that page? A. Right.

Q. And then looking at this entire page, which is in ink, except for typing on the heading and some pencil figures—— A. That is right——

Q. Are all those—that is, the handwriting—is that in your handwriting or whose?

A. No, that is all mine—pencil and everything.

Q. Including the pencil figures?

A. That is right.

Q. Now, going down the column that says "Net amount received,"—do you see such a column there?

A. I do.

Q. There is an item, is there, indicating \$5, and going down the column headed "Day"; is there such

(Testimony of Elizabeth Perry.)

a column? A. That is right: January 25.

Q. Now, the space for the day opposite the \$5 is blank, and about 1, 2, 3, 4 spaces above that appears "25" in that "Day" column; is that right?

A. That is right.

Q. Can you explain why that space opposite the \$5 is blank? [3066]

A. Well, I don't know that I can explain it. I mean, in bookkeeping we do that a lot—sometimes a check mark is made, and if you are in a hurry I don't know, do you have the date—and the next date shows "27"—that is common——

Trial Examiner: Let me explain at this point what the witness is doing: She is pointing out that all of the entries made from the time that the 25th was put down until the next date was shown were entries made on the same day.

Mr. Berke: Is that correct as the Trial Examiner stated? Is that the way?

The Witness: That is right.

Q. (By Mr. Berke): Then, what date would it appear that the \$5 was paid? A. On the 25th.

Q. What month? A. January, 1951.

Q. Now, going to the next column, which is headed "Received from"—is that correct, there is such a column? A. That is right.

Q. Following down that column and opposite the amount and date column, what appears in the "Received from" column?

A. In capitals, "SAGU," which we always used for Sebastopol Apple Growers Union.

(Testimony of Elizabeth Perry.)

Q. And then the next column is headed "Description," is it not? [3067] A. That is right.

Q. Now, going down that column opposite "SAGU," what appears in that description column?

A. "Membership fee."

Q. Now, there is another page to the right, is there not? A. Yes.

Q. To the right of the page I have just questioned you about? A. That is right.

Q. And is that also headed "Distribution of Cash Received"?

A. That is right. That is your distribution sheet.

Q. For the month of January, 1951?

A. 1951.

Q. Does it bear the same number, "21," as the sheet you have testified from?

A. That is right.

Q. Now, following across from the entry pertaining to SAGU, right across to this second sheet, there is a column headed "General Ledger—CR."; is that correct? A. That is right.

Q. And that column is further divided into two other columns, one headed "Acct." What does that stand for?

A. That is "on account"; moneys paid on account.

Q. All right. Now, following that column down to the point where "SAGU" appears—opposite "SAGU," what appears [3068] in the "Acct." column? A. \$400.

Q. And now,—strike that.

(Testimony of Elizabeth Perry.)

Now, under "General Ledger—Credit," appears a column next to the "Acct." column, entitled "Amount"; is that right? A. That is right.

Q. And following that down to the same line where "SAGU" appears, what appears in the "Amount" column? A. \$5.00.

Q. What is that \$400?

A. The \$400 carried forward here (indicating) which was paid on account right up here. There is a thousand, and notes payable——

Q. Wait a minute. What are you pointing to?

A. The \$400. I have to look at this.

This \$400 appears down here again, because it was carried forward. When you balance, you keep bringing stuff down——

Trial Examiner: You mean it doesn't indicate payment by SAGU?

The Witness: No, you are carrying——

Q. (By Mr. Berke): It was the same, and I wanted to develop what the pages show.

Is the amount——

A. That goes with this (indicating). [3069]

Q. And you are pointing to the entry for SAGU membership fee; is that right?

A. Right on that dark line.

Q. And are all those entries with respect to SAGU in your handwriting, Mrs. Perry?

A. Yes. That is all my handwriting, all the way through. [3070]

* * * * *

Mr. Berke: I will call Mr. Duckworth.

LEONARD J. DUCKWORTH

a witness called by and on behalf of the Respondent, having been previously duly sworn, was examined and testified as follows:

* * * * *

Direct Examination

Q. (By Mr. Berke): Mr. Duckworth, you have previously identified yourself as being the cannery superintendent for SAGU, have you not?

A. Yes.

Q. Now, do you recall the meeting that was held in the afternoon of October 15, at the warehouse, of the employees concerning a layoff?

A. Yes, I do. [3080]

Q. Now, who informed you that there was going to be such a meeting? A. Mr. McGuire.

Q. And when did he inform you about that?

A. That was either Thursday afternoon, or early Friday morning. I don't know exactly which time.

Q. Then upon getting such information, did you do anything?

A. Yes, I made a notice on the blackboard we have there in the plant, informed the employees there would be such a meeting held.

Q. And when did you put that notice up?

A. Oh, I imagine about 1:30 to 2:00 o'clock in the afternoon of that day.

Q. And did you attend that meeting?

A. Yes, I did.

Q. Were you there all of the time?

A. Not all of the time, no.

Q. Now, after the meeting, did all of the em-

(Testimony of Leonard J. Duckworth.)

employees who worked on the night shift return to that shift? A. No, they did not.

Q. Were the night shift employees informed at any time that they were to return to work on the night shift? A. Yes, they were. [3081]

* * * * *

Trial Examiner: Reframe the question.

Q. (By Mr. Berke): Was any effort made to notify the employees on that shift they were to return to work on that shift after the meeting?

A. Yes, there was. [3082]

Q. Was any effort made by you?

A. Yes, it was.

Q. In what way did you inform them?

A. Well, I informed those who I saw who came in; I also instructed the floorladies.

Q. Who?

A. Her name is Herrerias—Mrs. Herrerias; and also the night foreman, Charles Williams.

Q. Now, when did you inform Mrs. Herrerias and Mr. Williams?

A. Well, they came on shift about a half hour, usually, before the shift started, and I told them then that a meeting was to be held, to have all the people attend; also to inform the people who were to work on the night shift to be sure to return to work that night.

Q. And did you personally inform any of the night shift employees of that fact, that they were to return that night?

A. Yes, I did. The names I don't know. I mean,

(Testimony of Leonard J. Duckworth.)

as they came in, I caught whoever I could as they were coming in for the night shift, to be sure to go to the meeting and then to come back to work.

Q. Do you recall an employee by the name of Richard Breuer? A. Yes, I do.

Q. Did you have a conversation with him after the meeting? [3083]

* * * * *

Q. (By Mr. Berke): When, after this meeting, did you have this conversation with Mr. Breuer?

A. Well, when—we were packing the slices at the time and his job is to fill what we call the holding tank for the slices before they are vacuumed. He started to walk out the door.

Q. Started to walk—— [3084]

A. Out of the door of the cannery.

Q. When was this?

A. After the shift started again for the night shift, after the meeting was all over.

* * * * *

Q. (By Mr. Berke): Now, was anyone else present in this conversation between you and Mr. Breuer? A. No, not that I know of.

Q. What was his job at the time?

A. He filled the holding tanks for the sliced apples.

Q. And was he employed on the day or night shift? A. Employed on the night shift.

Q. Will you tell us the conversation, using the language that was used, as near as you can recollect?

(Testimony of Leonard J. Duckworth.)

A. Well, he was leaving his tank unattended, and he started to walk out the door. I asked him where he was going, and he said he was quitting, and I asked him, "Why?" and he said, "Well, if I am not going to work any more this year I may as well just quit right now." And he did.

Q. Is this the conversation? A. Yes.

Q. Now, Clarence Storey was one of the employees out there last year, was he not? [3085]

A. He was.

Q. What was his job?

A. He was dumping apples.

Q. Did you, during the course of the season, have occasion to talk with him about the performance of his job? A. Yes, I did.

Q. Did you talk with him more than once about it? A. Yes.

Q. About when was the first time?

A. I would say about two weeks after the season started.

Q. And about when did the season start last year?

A. I would say around the middle of July.

Q. And where were you at the time you talked with him? A. At the dumping station.

Q. Where is that?

A. That is on the south end of the cannery.

Q. Was there anyone else present besides you and Mr. Storey in the conversation?

A. Not in the conversation, no.

Q. Will you tell us what occurred at that time?

* * * * *

(Testimony of Leonard J. Duckworth.)

A. Well, on the first occasion, Clarence Storey was dumping [3086] the apples, we call it "too vigorously." He would throw them into the dumping station, rather than letting them go gently, and he was bruising the fruit by doing that. A couple of the Directors questioned me about it, so then I told Clarence Storey to please dump them more gently and not fill up the flume; instead of getting a big rush of apples all dumped at once, to take it easy and keep a gentle flow going.

Q. What did he say, if anything?

A. He said, "OK." It was all right by him.

Q. When was the next time you had occasion to talk to him about the performance of his job?

* * * * *

Q. (By Mr. Berke): When was the next time?

A. I would say about two or three weeks later.

Q. Sometime in the month of August?

A. Probably in August, yes.

Q. And where did it take place on that occasion?

A. In the same place as before: at the dump.

Q. And who was present during that conversation?

A. Oh, the people who were working there. I don't know who they were now.

Q. Were they within hearing distance?

A. They may have been.

Q. Who were they; do you recall?

A. No, I don't.

Q. What was your conversation on that occasion?

A. Well, a repetition of——

(Testimony of Leonard J. Duckworth.)

Q. Well, use as near as you can the language that was used.

A. I told him again that I had been criticized because the apples were being thrown into the flume too quickly, and that the apples were being bruised. I asked him again to dump more slowly and to keep a steady flow going.

Q. And what was his response, if anything?

A. He said, "OK," again. He would watch it.

Q. Now, were there any other occasions that you had to talk to him about performance of his job?

A. Yes. On about two occasions, later on, he did leave his post. I found him in the warehouse.

Q. When was that?

A. I would say that must have been around September, sometime—latter part of August or early in September.

Q. And what warehouse was this you found him in?

A. Regular cannery—the warehouse part of the cannery itself.

Q. You mean the section of the cannery that is referred to as the "cannery warehouse"?

A. Yes.

Q. Now, was there some conversation with Mr. Storey on that occasion?

A. I asked him to get back.

Q. Just answer yes or no.

A. Yes, there was.

Q. Was there anyone else present at the time?

A. To hear the conversation?

(Testimony of Leonard J. Duckworth.)

Q. Yes. A. No.

Q. All right. Will you tell us what was said?

A. I asked him to go back to his post. [3089]

Q. Was that all the conversation?

A. Yes, it was.

Q. Was this during working time?

A. Yes.

Q. Was it at the time when he was supposed to have been working, or on his break?

A. The men have no break.

Q. Now, when was the other occasion that you talked with him?

A. I would say within two weeks.

Q. And where did that take place?

A. Same place.

Q. What was he doing on the first occasion that you saw him in the cannery warehouse?

A. He was just talking to someone.

Q. Did the duties of his job take him in there?

A. No.

Q. Now, who was present on the second occasion in the warehouse?

A. Oh, the warehouse crew.

Q. Well, did they participate in the conversation? A. No, they did not.

Q. Did anyone else besides you and Mr. Storey participate in that conversation?

A. No. [3090]

Q. Will you tell us what was said there?

Trial Examiner: When was this conversation, now?

(Testimony of Leonard J. Duckworth.)

The Witness: About two weeks after the first occasion.

Trial Examiner: All right.

A. I just asked him to get back to his dumping station.

Q. (By Mr. Berke): What did he say?

A. He said, "OK."

Q. Did he go back then? A. Yes, he did.

Q. What was he doing on that occasion?

A. Just talking to someone in the warehouse.

Q. Was this during working time?

A. Yes.

Q. Now, while you were superintendent of the cannery last year, did any of the employees talk to you about the union?

A. On one occasion, Frank Unciano.

Q. When did that happen?

A. Oh, I don't know the date exactly. I imagine in September sometime.

Q. All right. And you say this is Frank?

A. Could have been October; I don't know for sure. Either late September or early October.

Q. Where did it take place?

A. In my home.

Q. "At my home"? [3091] A. Yes.

Q. What time of the day?

A. About 6:00 o'clock in the evening.

Q. Had you invited Mr. Unciano to your home?

A. No.

Q. On that occasion? A. I had not.

Q. Who was present besides you and Mr.

(Testimony of Leonard J. Duckworth.)

Unciano? A. My wife.

Q. And what took place then? Will you tell us what was said?

A. He came to my home at that time. Our floorlady, the day floorlady, Edna Hardin, had been quite ill, and on that occasion we had found cause to replace her with Alicia Unciano, Frank Unciano's wife. She had previously been floorlady for us, and at that time she was acting as floorlady.

And on this evening Frank Unciano came to my home and said that Mr. Bartini had bawled his wife out about something—I don't know what—and Frank was rather upset about it and so was his wife.

So he came to complain to me about it.

Q. What did he say to you?

A. He said, Mr. Martini called his wife down and she didn't like it, and he didn't like it either, and he asked me what I thought about the union.

Q. What did you say?

A. My answer was—do you want me to give my answer?

Q. Yes.

A. I said, so far as I saw I don't see it would do him much good in a short time operation as we have there.

Q. Was there anything more?

A. I said, of course he could do as he feels about it. I said it was his right, but personally—he asked me what I thought about it—and I told him I didn't think it would do much good.

(Testimony of Leonard J. Duckworth.)

Q. Was this all that was said about the union on that occasion? A. Yes.

Q. Now, were there ever any instructions given to the supervisory employees with respect to discussions concerning the union?

A. Yes, there were.

Mr. Karasick: All right. I will move to—Withdraw that.

Q. (By Mr. Berke): Who gave those instructions? A. Mr. Martini.

Q. When did he give them?

A. I would say late in July, when the union activities first started in our plant.

Q. To whom did he give them? [3093]

A. To me.

Q. Where were you at the time?

A. I don't know exactly where I was.

Q. Was there anyone else present besides you and Mr. Martini? A. No.

Q. What did Mr. Martini say?

A. He said it would be best if we refrain from discussing the union with any of the employees—any activity at all.

Q. And what did you say?

A. I said I would carry his instructions out and carry them down to my immediate supervisors.

Q. And did you do that? A. Yes.

Q. Who did you talk to?

A. Edna Hardin; Charles Williams; Mrs. Herrierias.

Q. What did you tell them?

(Testimony of Leonard J. Duckworth.)

A. I just told them that Mr. Martini thought it would be advisable if we did not discuss union activity at all, and to refrain from discussing it with any of the employees.

Q. Now, Mr. Duckworth, you know Orice Storey, don't you? A. Yes, I do.

Q. She testified here that on August the 4th she got two cards—two union authorization cards—from you while she was in her car at the parking lot, and that as you gave them to her you said to her, as you left, "Hit that man with these," [3094] and you pointed to someone who was walking toward the highway.

Did any such incident take place?

A. It did not.

Q. Did you ever give Orice Storey any union authorization cards? A. I did not.

Q. Did you ever tell her to "Hit" any man with cards or anything else? A. I did not.

Q. Now, Frank Unciano testified here that about three weeks before the layoff he asked you why they were sending all those apples to the Co-op, and that you told him that they were trying to finish all the apples because they were afraid the union was trying to get in and they did not want to do business with unions.

Did you ever have any conversation about that with Mr. Unciano? A. I did not.

Q. Did you ever discuss with him a reason for the apples going over to the Co-op? A. No.

(Testimony of Leonard J. Duckworth.)

Q. Now, Clarence Storey testified here that on September 23, about 11:45 a.m., he went to punch in and that you caught him by the sleeve and held onto it and said, "Martini wants to see you in his office."

Did such a conversation, such an incident occur?

A. May I explain a little?

Q. Go ahead.

A. I told him Mr. Martini wanted to see him. I did not catch him by the sleeve.

Q. Did you hold onto his arm?

A. I did not.

Q. Did you go with him to Mr. Martini's office?

A. No.

Q. Or up to the cannery office? A. No.

Q. Were you in the meeting between Mr. Storey and Mr. Martini? A. No.

Q. Now, Mr. Storey also testified that while he was in this meeting with Mr. Martini he heard only one whistle blow; that two whistles generally blow, one about 7 minutes before work time, and the second blows at 12:00 noon on the dot. This is during the lunch period.

Now, did two whistles ever blow during the lunch period at the cannery last year? A. Never.

Q. Did a whistle blow five or seven minutes before the end of the lunch period last year?

A. No. [3096]

* * * * *

Q. (By Mr. Berke): How many whistles blow or did blow during the lunch period last year?

A. We blow one whistle when the lunch period

(Testimony of Leonard J. Duckworth.)

starts; we blow one whistle when the lunch period ends.

Mr. Berke: I am getting to a question that has pretty strong language in it. Do you want Mrs. Storey to remain?

* * * * *

Q. (By Mr. Berke): Mr. Storey testified that on September 25, at about 11:45 a.m., Mr. Martini came out of the south door in the cannery and called Storey out into the street, on company property, and asked him, "Do you know what your wife is doing? She is forming a committee on the night shift. You go out and fire her."

Mr. Storey testified that he replied, "That is your fucking job; if you want to fire her, you go fire her. I only work here. You are the boss."

He also testified that on that occasion you, Mr. Duckworth, [3097] said you had two witnesses to prove Mrs. Storey was forming a committee—two girls.

Then Mr. Storey said Mr. Bondi came around the truck and said, "If you have two witnesses, that is enough; I will sign her check."

Mr. Storey further testified that on that same occasion he said to Mr. Martini that his wife was on her own time and Mr. Martini said, "Why don't they get their fucking committee, and get it over with."

Mr. Martini said, "I am the boss. Why the hell don't you get Bertolucci and Rhodes to shut the goddamn thing down. If you don't I am going to."

(Testimony of Leonard J. Duckworth.)

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Q. Go ahead.

A. I told him Mr. Martini wanted to see him. I did not catch him by the sleeve.

Q. Did you hold onto his arm?

A. I did not.

Q. Did you go with him to Mr. Martini's office?

A. No.

Q. Or up to the cannery office? A. No.

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* * * * *

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(Testimony of Leonard J. Duckworth.)

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Mr. Martini said, "I am the boss. Why the hell don't you get Bertolucci and Rhodes to shut the goddamn thing down. If you don't I am going to."

(Testimony of Leonard J. Duckworth.)

Then Mr. Martini said he forbade talking about the union on company property.

Now, did such an incident occur, Mr. Duckworth?

A. It did occur, but not that conversation.

Q. Would you tell us what did occur on that occasion, Mr. Duckworth?

A. Well, on that occasion Mr. Martini and I came together around the side of the building. Mr. Martini wanted to talk to Mr. Storey and Mr. Martini did, I imagine, use a little hard language. I mean, not abusive, but a little strong, shall we say.

* * * * *

Q. (By Mr. Berke): Give us, as near as you recall, the language which was used.

A. He told him that, Mr. Martini told Storey, that he had discharged his wife and that he would be next—that is, Clarence Storey himself would be next—if he didn't quit goofing off and leaving his post when he is not supposed to.

Q. What was the strong language?

A. A few "hells" and "damns" maybe; I don't know exactly.

Q. Did he use the words that I gave you that Mr. Storey used twice in his testimony?

A. No, I don't believe so.

Q. Was Tony Bondi present?

A. No, he was not.

Q. Did you say that you had two witnesses to prove that [3099] Mrs. Storey was forming a committee—two girls? A. No, I did not. [3100]

* * * * *

(Testimony of Leonard J. Duckworth.)

Cross Examination * * * * *

Q. (By Mr. Karasick): How long after the meeting was over did you leave?

A. Did I leave the meeting?

Q. Yes. A. Immediately.

Q. And where did you go?

A. Right back to the cannery.

Q. And you talked to no one—no employees or anyone else? A. Only one man.

Q. I see. And that was who?

A. That was Breuer.

May I change that?

Q. Yes.

A. I did speak to other employees. Some were confused about going back to work, so I made it very clear that the night [3106] shift was to work, and to whom I spoke, by name, I don't know.

Q. You don't recall?

A. No, but I did speak to several persons and told them to finish the night shift.

Q. They came up and told you they were confused? A. That is right, yes.

Q. Do you remember how many there were, if you don't remember names?

A. I don't remember exactly.

Q. Several?

A. Several. And I can go on from there, too, if I may.

Q. If you like.

A. I instructed Ella Herrerias, the night floor-lady, and Charles Williams, the night foreman, to

(Testimony of Leonard J. Duckworth.)

make sure that the night shift went back to work.

* * * * *

Q. There was a whistle which blew at the beginning of the lunch hour, and a whistle which blew at the conclusion of the lunch hour on the day shift last year? A. That is right.

Q. Do you remember that there was a short time — a short period of time — when there was a short blast of the whistle some two minutes before, to warn the employees the whistle was going to blow? A. No.

Q. Will you answer the question? A. No.

Q. Your testimony is that at no time last year during the operating season on the day shift was a warning blast of the whistle blown—a short blast—slightly or shortly before approximately seven minutes, or thereabouts, before the whistle blew for the return to the noon shift?

A. There was never a whistle like that; never.

* * * * *

VIRGINIA CHICANO

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows: [3149]

* * * * *

Direct Examination

Q. (By Mr. Berke): Mrs. Chicano, do you work for the Sebastopol Apple Growers Union?

A. For three years.

Q. Is that place sometimes known as Molino or SAGU?

(Testimony of Virginia Chicano.)

A. Well, that is all I know, name is Molino.

Q. You know it as Molino?

A. That is right.

Q. Are you working there now?

A. Yes, I do.

Q. What job do you have? A. Trimmer.

Q. And how long have you been a trimmer?

A. All the time.

Q. All the three years that you were there?

A. That's right.

Q. Last year, what shift did you work on?

A. I started with the day shift, and when the night shift come in, they transferred me to the night shift.

Q. Now, how long did you work on the day shift last year, when you started? [3150]

A. I guess about a week or so before the night shift started.

Q. Do you know what month that was?

A. No, I don't—when we start?

Q. Yes.

A. We start in July last year.

Q. July. And who was your floorlady on the night shift? A. Mrs. Herrerias.

Q. And how long did you remain on the night shift? A. Until it was through.

Q. And when was that; do you know?

A. Month? Oh, gee, what was that? I forgot all the time, the month. You know how it is.

Q. Do you remember the layoff in October?

A. Yes.

(Testimony of Virginia Chicano.)

Q. Of last year? A. Yes, I do.

Q. Did you work right up to that time?

A. Yes.

Q. And then did you continue to work after the layoff? A. Yes.

Q. What job did you have at that time?

A. Trimming—just the same thing.

Q. Who was your floor lady then?

A. Mrs. Herrerias. [3151]

Q. Do you remember the meeting that was held in the warehouse about the middle of October of last year, of the employees, for the layoff?

A. Yes.

Q. Now, keeping in mind that particular time, do you recall an incident involving some apples?

A. Yes.

Q. About when did that occur, that incident?

A. Two afternoons.

Q. Two afternoons. When, with relation to that meeting in the middle of October?

A. Oh, there was about two-three weeks after.

Q. And you say this was two afternoons?

A. That is right.

Q. And where were you at the time?

A. I was in the squirrel cage—you know, picked all the apples for the trimmers, pick up all the bad apples and trim them myself.

Q. You were down at what cage?

A. Squirrel cage.

Q. Squirrel cage? A. That is right.

Q. And your job was inspecting and trimming?

(Testimony of Virginia Chicano.)

A. That is right. [3152]

* * * * *

Q. (By Mr. Berke): Will you tell us what you saw about the apples?

A. Well, the apples was beautiful, big apples, and there was making big holes and putting the cores——

Mr. Karasick: May I ask that the description be “most beautiful, big apples,” be deleted as being conclusion and the characterization of the witness.

Trial Examiner: No. I think I will let it stand with the note that the witness was indicating an apple about eight inches across in diameter.

Mr. Berke: That is correct.

The Witness: That is correct.

Q. (By Mr. Berke): And what did you notice about these apples?

A. Well, they had a core through, and we was making Fancy, you know, for apple pies, and I said, “Gee, this is funny. They come in the squirrel cage like that.”

Q. Do you recall how many such apples you saw?

A. Well, about two or three dozen like that, I say.

Trial Examiner: Two or three dozen?

The Witness: About.

Q. (By Mr. Berke): Did you ever do anything to any of those [3153] apples?

A. Well, I was trimming the back—had my back like this, and the way they come, I put some in the box, aside.

(Testimony of Virginia Chicano.)

Q. Some. About how many; do you recall?

A. Five or six, I guess; I put them on one side there.

Q. Had you ever seen apples like that before those two occasions? A. I never did.

Q. Did you ever see apples like that again after the second occasion? A. I never did.

Q. Now, what happened to the apples that you picked up—the six or seven that you said you put in the box?

A. The floorlady passed by; she grabbed——

Q. Take it slowly. What?

A. The floorlady came by and took it away. I don't know.

Q. Who was that? A. Mrs. Herrerias.

Q. Did she say anything to you?

A. If she ever says anything with the noise I never heard.

Q. You didn't hear her? A. No.

Q. Did you know Mrs. Dickerson?

A. No, I don't know that woman. I knowed all the girls, say, "Hello"; that is all. But I don't know her. [3154]

Q. You don't know her personally?

A. No, I don't.

Q. Now, while you worked at SAGU, Mrs. Chicano, did you see any apples with faces on them?

A. I never did.

Q. Did you ever see any apples with hair on them for dress-up? A. I never did.

(Testimony of Virginia Chicano.)

Q. Did you ever see any apples made into dolls?

A. No, I never did. [3155]

* * * * *

Q. Do you know Mrs. Storey? A. Yes.

Q. She is the lady sitting here?

A. That is right.

Q. Now, did Mrs. Storey ever talk to you about joining the union? A. One afternoon.

Q. Is the answer "yes"? A. Yes.

Q. Now, when was it; do you recall?

A. One Saturday.

Q. One Saturday?

A. (Nodding affirmatively.)

Q. About what time?

A. Well, around quarter to 12:00. Because there was coming out, and we was going in to work.

Q. And do you recall about what month that would be? A. No, I don't.

Q. Where was Mrs. Storey at the time? [3158]

A. I was sitting under the balcony—two benches over there—and Mrs. Storey came in by me and told me, "Don't you want to sign a card for the union."

Q. About what time of the day was this?

A. Between a quarter to 12:00.

Q. Between a quarter to 12:00 and—

A. Quarter to 12:00. There was coming out 12:00 o'clock; we was going in to work at 12:00.

Q. And you say you were sitting on a bench?

A. Yes.

Q. Under the balcony? A. Yes.

(Testimony of Virginia Chicano.)

Q. Were there any other people present who heard your conversation with Mrs. Storey?

A. No. [3159]

* * * * *

Q. (By Mr. Berke): Tell us, as near as you recall, what she said to you and what you said to her.

A. She came to me and told me, "You want to sign a card for the union?" And I told her, "I am old enough to do what I want to do, not what nobody tell me what to do."

Q. Now, you say you can't recall the date when that occurred? A. No.

Q. Would it refresh your memory if I were to suggest a date to you? A. Maybe.

Q. Was it about the latter part of September last year?

A. It was. I guess it was the last part of September.

Q. Now, on that same occasion, did Mrs. Storey talk to any [3160] other women?

A. Well, she left me and she went and talked to some other girls. I never heard what she said—never paid attention .

Q. You didn't hear what was said?

A. No.

Q. Did you pick up a rubber mouse down at the squirrel cage? A. No.

Q. Did you ever pick up any rubber gloves or any other rubber object? A. No.

Q. Do you know Irma Bate? A. Yes.

(Testimony of Virginia Chicano.)

Q. Bearing in mind the meeting in the warehouse on October 15, when you had the layoff meeting, did you have a conversation with Irma Bate around that time? A. I guess so, I did.

Q. Pardon?

A. Do you mean if I talked the same day from the layoff?

Q. No. Around that time? A. Yes.

Q. When was it that you talked with Mrs. Bate?

A. I talked to her—I seen her going to my house the Saturday after the layoff.

Q. Yes. [3161]

A. And then in a Monday when we went to work I told her, I say, “You stuck up.”

Q. Wait a minute. This was Monday. How do you remember with respect to the layoff?

A. When we starting to work on the day shift.

Q. That was the Monday following the layoff meeting? A. That is right.

Q. Where did you talk with Mrs. Bate?

A. I was working over there by my place—the squirrel cage—and she came in.

Q. All right. What time of the day was this?

A. It was in the morning, between 10:00 to 10:30, we get the recess period.

Q. I see. Were you working at the squirrel cage at that time? A. Yes.

Q. And where was she?

A. She was getting her recess period, and she came and talked to me.

(Testimony of Virginia Chicano.)

Q. And was there anyone else present that took part in the conversation? A. No.

Q. What did she say to you and what did you say to her?

A. I told her, "Stuck up." I say, "You was in the neighborhood and never came in and see me." She told me, "I [3162] went to take papers to Ella's."

Q. Now, what "Ella" was she referring to, or do you understand she was referring to?

A. She told me Ella Herrerias.

Q. Now, you said something to her about "stuck up," that she was in the neighborhood?

A. That is right.

Q. What neighborhood were you talking about?

A. Well, she went to the road to where I live to, she passed the same road.

Q. When was it you saw her do that?

A. On Saturday after the layoff.

Q. And where were you at the time when you saw her?

A. My husband was knocking the old house we had down, built new home on the property, and we was knocking the old house down. We was, oh, about 15 feet, when she went to the road and I see her.

Q. Where was that?

A. She was going in the car—her car.

Q. And did Ella Herrerias live there, near there at the time?

(Testimony of Virginia Chicano.)

A. Yes, she lived a way up, oh, I don't know, about a quarter of a mile, not quite, I think.

Q. A quarter of a mile?

A. Not quite, I think. [3163]

* * * * *

GEORGIA LOUISE HOWSE

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows: [3195]

* * * * *

Direct Examination

Q. (By Mr. Berke): Mrs. Howse, by whom are you presently employed?

A. By the Apple Growers Union.

Q. Is that the Sebastopol Apple Growers Union?

A. Yes.

Q. Sometimes known as Molino or SAGU?

A. People call it that; I guess so.

Q. Have you ever heard it called by either one of those terms? A. Yes.

Q. What is your job at the present time?

A. I am what they call the laboratory technician right now.

Q. And what shift do you work now?

A. I work the night shift.

Q. When did you first go to work for SAGU?

A. Well, it was last year, August—around August 14.

Q. And what job did you have at that time?

A. Well, when I first started I worked outside on the conveyor.

(Testimony of Georgia Louise Howse.)

Q. On the conveyor what? [3196]

A. Conveyor belt.

Q. And what was your job then?

A. Well, it was sorter, or to take the bad apples off this belt that went by.

Q. Now, where was this conveyor belt that you worked on when you started last year?

A. It was outside the cannery.

Q. Go ahead.

A. There is a roof over it and everything, but it is outside; it isn't in, where they make the sauce or slices.

Q. Do you know Clarence Storey? A. Yes.

Q. Did you know where he worked last year?

A. Yes.

Q. Now, with relation to the place where he worked at SAGU, where was your job performed?

A. Well, near him. I imagine it would be about six foot away from him—somewhere like that.

Q. Now, will you tell us just what your duties were when you started working there last year on this conveyor?

A. Well, we just stood there and when the apples passed over the conveyor belt, we picked the bad apples off and we threw them in a bin that took them away.

Q. Now, who put the apples on the conveyor that you were inspecting? [3197]

A. Mr. Storey put them there.

Q. And how long were you working on that job at that time?

(Testimony of Georgia Louise Howse.)

A. Oh, I worked there about ten days.

Q. And then after the ten days, where did you work?

A. I went inside to work then as a trimmer.

Q. And did you work for the balance of the 1954 season as a trimmer?

A. No. I worked as a trimmer about ten days.

Q. And then what occurred?

A. Well, Mr. Duckworth asked me if I would like to go upstairs and work in the lab.

Q. And did you go up there immediately?

A. Yes. Well, he said it would be a few days; he would come around and talk to me more about it. But then after that, I went up there for about an hour each day for a week, learning, and then after that I was up there all of the time.

Q. You say you were "up there learning"? Did someone teach you?

A. Yes.

Q. Who was it?

A. Well, Mr. Duckworth and Ruth Winkler.

Q. Who else?

A. And Mrs. Doty. They all helped show me what to do.

Q. Now, were there four of you that worked in the laboratory?

A. No. Ruth Winkler quit to go back to school, so that just [3198] left Mrs. Doty and I.

Q. Did you take Ruth Winkler's job?

A. Yes.

Q. And did you remain in the laboratory, then, for the balance of the 1954 season?

(Testimony of Georgia Louise Howse.)

A. Well, I worked from—I mean, I worked there, but not all of the time. I worked when they started making slices, then I went back out to the grader—I mean, the conveyor belt with the penetrometer.

Q. Do you mean the same conveyor belt where you started in August of 1954?

A. Yes. [3199]

* * * * *

Q. Now, when you first began to work—about August 14—on the conveyor out near Mr. Storey, who was your Supervisor?

A. Mr. Duckworth.

Q. And was he your immediate supervisor?

A. Well, no. He was over the plant.

Q. I mean your immediate supervisor?

A. I was under Edna Hardin, the floorlady.

Q. Now, while you worked out there for about a period of ten days in August, did you observe how Mr. Storey dumped the apples? A. Yes.

Q. And were these apples that were dumped by him the ones that you say came along the conveyor that you inspected? A. Yes.

Q. Will you tell us what you observed in connection with this dumping of the apples?

Mr. Karasick: I will object.

Trial Examiner: Overruled.

A. Well, Mr. Storey would dump them in great big heaps on the conveyor belt but about a foot deep or more and three or four boxes or more and start the conveyor and they would all go up this

(Testimony of Georgia Louise Howse.)

conveyor belt, and there was only a couple girls there, and we couldn't get all the bad apples or worms or whatever in there and after while, when they got inside the plant the worms and things would be showing up, and then the floorlady would come and give us a bad time about it. [3201]

* * * * *

Q. (By Mr. Berke): Who was your floorlady at the time that you say came out—

A. Edna Hardin.

Q. —and gave you a bad time. What did she say?

A. She said that we would have to try harder to get the worms out of the apples.

Q. And did you say anything to her?

A. Well, yes.

Q. What did you say?

A. I said we couldn't, the way they were going over the conveyor; they were so thick and deep we couldn't get them all out that way.

Trial Examiner: Excuse me. I want to get straight on one thing.

You said, "get the worms out of the apples."

The Witness: Wormy apples off the belt—sunburned and anything else that was there.

Q. (By Mr. Berke): You don't mean take the sunburn off?

A. Take the sunburned apples out and put them in the bin.

Q. Now, were there any occasions while you

(Testimony of Georgia Louise Howse.)

worked there when any incidents occurred involving empty boxes? A. Well, yes.

Q. About when did that occur? [3202]

A. Oh, well, that was after Mrs. Storey was discharged.

Q. Do you recall about when she was discharged?

A. Oh, that was around September the 25th, somewhere around there.

Q. And how long was this after her discharge that this incident occurred?

A. I would say it was a week or ten days.

Q. And where did it occur?

A. Well, outside, on the conveyor belt.

Q. And at that time, what were you doing?

A. I was using the pentrometer then.

Q. And in connection with using the pentrometer in testing the apples that you have testified, where did you do that testing?

A. You mean the testing of the applesauce?

Q. No. With the pentrometer, as you have testified?

A. Well, beside the conveyor belt, about a foot—no, about a yard away from Mr. Storey.

Q. And did you do that daily? A. Yes.

Q. And with what frequency during the day did you do that?

A. Well, I stayed out there most all day some days. It depended on if they were having a lot of ripe apples, I stayed all the time, because we had to watch them more closely.

Q. Now, do you wear glasses? [3203]

(Testimony of Georgia Louise Howse.)

A. Yes.

Q. And were you wearing glasses at that time?

A. Yes, sir.

Q. Did you wear them constantly last year?

A. Yes.

Q. And did you wear them at your work?

A. Yes.

Q. When this incident occurred, who else was present at the time?

A. Oh, I don't know. There was Erma Bate and there was another woman—I forget her name—Ernie something—I don't remember her last name. Ernestine Hackner, or something like that. I don't remember her last name.

Q. Do you recall about what time of the day it was that it occurred?

A. Well, it was around 11:00 o'clock in the morning, I imagine.

Q. All right. Will you relate what happened, please?

A. Well, Mr. Storey would let these empty boxes go up the conveyor belt. And he kept doing it and doing it and he waited until I would be reaching over the conveyor belt getting an apple and so one day he said—I complained to him, I said, "You are doing this to hit me," or something like that to him, and he didn't pay any attention.

So one day he says, "Well, you better take your glasses [3204] off," and I says, "I wouldn't take my glasses off because I needed them in my work."

* * * * * [3205]

(Testimony of Georgia Louise Howse.)

Q. (By Mr. Berke): Whom did you notify?

A. Well, I told Mr. Duckworth and Esther Doty and the people in the lab when I went up for lunch.

Q. And the supervisor that you told was Mr. Duckworth? A. Yes. [3207]

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ROBERT NORMAN LEE

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

* * * * *

Direct Examination

Q. (By Mr. Berke): Mr. Lee, are you employed by the Sebastopol Apple Growers Union?

A. Yes, I am. [3209]

* * * * *

Q. (By Mr. Berke): Now, did you, at any time during 1954, operate the lift truck inside the cannery? A. Yes, I did.

Q. About when? [3211]

A. That was around—it was the latter part of July when I operated in there.

Q. And for how long a time did you operate it in the cannery? A. Two days.

Q. Was that part of your regular duties?

A. No, sir.

Q. Who was the regular operator at that time?

A. I don't know who it was that was operating, but he was sick those two days.

Q. And you replaced him for those two days?

A. That is right.

(Testimony of Robert Norman Lee.)

Q. Now, what did you do with the lift truck during that period when you operated in the cannery last year?

A. Well, that was taking—they have a big tank that they put the sliced apples in. You pick that up and take it over to the vacuum and when the vacuum is pumped out of it, you pick, lift it up about ten foot, I guess, to the blanching tank, where it was dumped.

Q. Now, will you describe the operation—that is, how you would go about lifting the tanks onto the lift truck or the fork lift, and just go through the maneuvers that you would go through.

A. Well, you take an empty tank from outside and you set it up to where they fill it, and then it is filled and then you had to drive in, pick it up, back up, drive in to the [3212] vacuum tank, set it down, and back out, and let the bell down over it to pump the vacuum.

Then you raised the bell, picked that tank up, and set it upstairs on the blanching tank.

Q. How would you raise it up to the blanching tank?

A. With the lift, raise it up there—pull it around and raise it up.

Q. Now, when you had the tank on the fork lift, or the lift truck, where would it be? On the front or rear of the fork lift?

A. Well, it is the front of the lift truck—you are facing the tank.

Q. Now, in making these movements that you

(Testimony of Robert Norman Lee.)

have described, when you have got the tank on the lift truck in front of you, can you see in front of you—see what is going on in front of you?

A. Not——

Q. Now, did you have a lot of room in which to make these movements that you described, inside the cannery?

A. No, there wasn't very much room in there.

Q. Do you recall, Mr. Lee, an unusual occurrence in the cannery sometime in September of 1954?

A. Yes, I do. [3213]

* * * * *

Q. (By Mr. Berke): Did this occurrence happen every day at the cannery?

A. No, it did not.

Q. About when in September, as near as you recall, was it that it occurred?

A. Between September 22 and the 25th. But now, the exact date, I don't remember.

Q. Do you remember what time of the day it was?

A. Yes; it was 12:03.

Q. 12:03 what?

A. Well, it was lunch time; I was going to eat.

Q. 12:03 in the morning—a.m. or p.m.?

A. Well, it would be p.m. because—noon—it would be a.m.—no.

Trial Examiner: Well, you said "noon". [3214]

A. (Continuing) I was going to eat at noon, 12:03.

Q. (By Mr. Berke): How do you recall it was 12:03?

(Testimony of Robert Norman Lee.)

A. Because when the whistle blows I am at cold storage, and I have to walk to the cannery, and that takes approximately three minutes.

Q. And what were you doing at the time that this occurrence took place?

A. I was going to punch out.

Q. And you were going to punch out for what?

A. To go eat.

Q. And what period did you have then for lunch?

A. From 12:00 to 1:00.

Q. Do you recall what the lunch hour for the women was at that time?

A. It was from 11:00 to 12:00 then, because they were taking an hour for lunch at that time.

Q. Now, whereabouts were you when you saw that occurrence?

A. I was standing right in front of the time clock.

Q. And will you describe what you saw?

A. You mean who I saw and what I heard?

Q. All the details, as near as you can recall.

A. I saw Mr. Martini standing there, and a whole group of women. It was around 15 or 20 women. So naturally I am the inquisitive type anyway, so I stayed to listen.

Q. Now, where did you see Mr. Martini and this group of [3215] women?

A. They were standing right between the time clock and the blanching tank. That is the same path that the lift truck has to go through to get to the vacuum bells.

(Testimony of Robert Norman Lee.)

Q. And you say being inquisitive you did what?

A. I listened and looked.

Mr. Karasick: Well,—go ahead.

Q. (By Mr. Berke): Tell us what you saw and what you heard.

A. Well, I saw Mrs. Storey, as I recall, because I knew her from sight.

Q. Is she in this hearing room.

A. Yes, she is.

Q. Go ahead.

A. And a group of women, who I don't recall at the time, and Mr. Martini, was there. I heard Mrs. Storey tell Mr. Martini that he had to meet with the union officials or they were not going back to work. In other words, it was a walk-out or whatever they call it.

Mr. Karasick: Just a moment—

Q. (By Mr. Berke): Is that what she said or your interpretation?

A. She said they weren't going back to work unless he talked with the union officials and got straightened out.

Mr. Karasick: May the characterization "in other words, et cetera" be stricken? [3216]

Trial Examiner: That little phrase may be, yes.

Q. (By Mr. Berke): Did you hear what Mr. Martini said? A. Yes, I did.

Q. Will you tell us.

A. He said they could not do anything about it because it was all turned over to the National

(Testimony of Robert Norman Lee.)

Labor Relations Board and it was out of his hands entirely now.

Q. And did you remain there, or what did you do?

A. No, I went on and ate. I went up and told my foreman about it.

Q. Well, you say there were 15 or 20 women that were standing around with Mrs. Storey at the time?

A. There must have been at least that.

Q. What were the other women doing at the time?

A. Well, the rest of them had gone back to work. They weren't standing there, because the whistle had already blown and they were peeling apples.

Q. Did you see them actually working?

A. Yes. When you walk in to the time clock you can see everybody in there.

Q. You saw them? A. Yes, sir.

Q. Did you notice whether or not there were any apples in the flume?

A. Well, I know there were apples in the flume, yes. [3217]

Q. Did you notice on that particular day?

A. The dumpers were coming when I came by—had to be apples in the flume.

Q. On that particular occasion?

A. Yes, sir.

Trial Examiner: You say they were dumping?

The Witness: Yes. There is two dumpers.

(Testimony of Robert Norman Lee.)

Trial Examiner: Do you know them?

The Witness: They change often. One was Mr. Storey. If I recall, he was dumping then, and he had a young fellow helping him. I don't know who he was.

Q. (By Mr. Berke): When you left the group of women, was Mr. Martini still there?

A. Yes, he was still there.

Q. Now, do you know Clarence Storey?

A. Yes, sir—not personally, but I know him.

Q. You would know him if you saw him?

A. Uh-huh.

Q. Do you recall an incident involving Mr. Storey sometime in August of 1954.

A. Well, there were several incidents. There is one in particular I do recall, but——

Q. When was that, the one that you particularly recall?

A. Well, that was—you mean the date?

Q. About. If you can give us the date or otherwise fix it—— [3218] A. I don't know.

Q. Do you know when, about, it was?

A. It was the latter part of September—well, it must have been the latter part of September—first part of September.

Q. Where did this occur?

A. It occurred at the dumps where they dump the apples.

Q. Who was present there at the time?

A. There were several there. I don't recall who, exactly, was there.

Q. What were you doing on that occasion?

(Testimony of Robert Norman Lee.)

A. I was setting apples up to the dump, which we do. We haul apples up to the canner and sometimes if the lift truck to the cannery hasn't set up a pallet of apples, we set them up.

Q. Who is "we"?

A. Two lift drivers, cold storage.

Q. And that would be you and someone else?

A. Last year, Jimmy Higgins and myself.

Q. Will you tell us what occurred on that occasion that you particularly remember?

A. Well, it was when they gave him a helper. He said he couldn't dump the apples by himself and he wouldn't, and they gave him two young boys to help, and he had them dumping apples and he wasn't, and that is what I recall. [3219]

Q. You recall seeing them dumping, but not him?

A. Well, he said he wasn't going to; he wasn't getting paid enough for dumping. [3220]

* * * * *

MARY ELOIS CADDEL

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Trial Examiner: What is your full name?

The Witness: Mary Elois Caddel.

Trial Examiner: And your home address?

The Witness: 2660 Gravenstein Highway South, Sebastopol, California.

Direct Examination

Q. (By Mr. Berke): Mrs. Caddel, where are

(Testimony of Mary Elois Caddel.)

you presently employed? A. Molino.

Q. Is that the Sebastopol Apple Growers Union?

A. Correct. [3249]

* * * * *

Q. When did you first go to work for Molino?

A. 13th of September, 1954.

Q. And what shift did you work on? [3249-A]

A. The night shift.

Q. What was your job at the time?

A. Trimmed apples.

Q. And did you continue to work the night shift throughout that season?

A. No; I worked the night shift until the layoff.

Q. And what happened after that?

A. And I went on days.

Q. What was your job when you were on days?

A. I trimmed apples the same.

Q. When you worked the night shift, who was your floorlady? A. Ella Herrerias.

Q. And then when you worked days?

A. Ella Herrerias.

Q. Was she still your floorlady? A. Yes.

Q. Did you join a union or sign a pledge card for some union while you worked for Molino?

A. I did.

Q. About when did you do that?

A. Well, I signed a pledge card twice. I worked at Co-op before I worked at Molino.

Q. Did you sign one while you were working at Co-op? A. I did.

Q. For what union? [3250]

(Testimony of Mary Elois Caddel.)

A. Teamster's, A.F.L.

Q. And do I understand you signed another one when you went to work for Molino?

A. I did, at South Sebastopol.

Q. When was that with relation to the time you went to work at Molino?

A. I would say a week or so after I started to work; the latter part of September.

Q. Do I understand that you worked for the Sebastopol Co-op Cannery in 1954 prior to going to work for Molino?

A. I did.

Q. When did you last work at the Co-op Cannery?

A. The 10th of September.

Q. And while there what shift did you work?

A. I worked the night shift.

Q. And did you quit or were you laid off?

A. No; the season had ended temporarily. They told us we perhaps would be called back in a week or two.

Q. With relation to the time that you were laid off then at the Co-op Cannery, when were you told about it?

A. Well, we were due to work until 2:30 that night, but about 8:00 o'clock the floorlady called us over and said this was it until a week or so, and we were forced to check out, and we did. [3251]

* * * * *

Q. (By Mr. Berke): Did you have any prior notice other than the notice you got that evening at the Co-op about the layoff?

A. No. [3252]

* * * * *

(Testimony of Mary Elois Caddel.)

Q. And how long did you continue to work at Molino in 1954?

A. Until the season ended in December.

Q. Did you ever have a discussion with your floorlady while working at Molino concerning your signing of the pledge card?

A. I did.

Q. About when did you have that discussion?

A. Well, several days after the layoff.

Q. And when you are talking about the layoff, what layoff do you have reference to?

A. When we changed into one shift.

Q. And do you remember what you were doing at the time you had this discussion?

A. Yes; I was trimming apples.

Q. And do you recall who was present in the conversation?

A. Just the floorlady and myself.

Q. Who was the floorlady?

A. Ella Herrerias.

Q. Do you know about what time of the day it was?

A. I don't remember.

Q. Can you tell us what part of the day, whether it was—

A. I think it was in the afternoon.

Q. Will you tell us what the conversation was and tell us who was speaking?

A. Well, she came by there this particular time in between my [3253] partner and I, as she usually did several times during the day, checked the apples and see how we were working. So I told her, asked

(Testimony of Mary Elois Caddel.)

her if she had a few minutes, I would like to talk with her and she said, "All right, go ahead."

I said, "Ella, I have heard rumors that all the girls were laid off that had signed pledge cards, and I want you to know that I had signed a pledge card; if it makes any difference, why, say so, perhaps there is a mistake in my being here."

She said, "Mary, you haven't a thing to worry about. I did not know who signed the pledge cards. It doesn't make any difference to me whether you are union or not union. I kept my girls, selected them from the way they worked."

So I thanked her. [3254]

* * * * *

Q. (By Mr. Berke): While you worked at Molino, Mrs. Caddel, did you see any apples that were dressed up like dolls or carved into dolls?

A. I have seen a few apples around Halloween time that had faces carved on them.

Q. Did you observe whether those were peeled or unpeeled apples?

A. Those were unpeeled, the ones I am speaking of.

Q. And did you observe anything as to their size? A. They were extra large.

Q. By the way, did you ever withdraw your pledge card from the Teamsters Union?

A. I did not.

Q. You have worked all this season, have you?

A. I have. [3255]

* * * * *

(Testimony of Mary Elois Caddel.)

Q. Did you vote in the election that was held last year? A. Yes.

Q. Did you ever hear Ella Herrerias say that the company knew who was attending union meetings and had a list of them and they would be fired?

Mr. Karasick: I object to that.

Trial Examiner: Overruled.

The Witness: No.

Q. (By Mr. Berke): Did you ever hear Ella Herrerias say, or did she ever say to you that there was to be no talking about the union at work?

A. She never said that to me.

Q. Did you ever hear her say that to anyone else? A. No.

Q. Did you ever hear her say that those who would talk about the union while at work would be fired or blacklisted? A. No.

Q. Did she ever tell you that? A. No.

Q. Did you know Mrs. Herrerias before you went to work at the Sebastopol Apple Growers Union or Molino?

A. I had never seen her until I applied for work.

Mr. Berke: You may cross examine. [3256]

Cross Examination

* * * * *

Q. (By Mr. Karasick): Last year you filled out an application when you were at Molino before you went to work there?

A. The day I went to work.

(Testimony of Mary Elois Caddel.)

Q. This year did you fill out an application too?

A. I did.

Q. And I show you a document which is marked as General Counsel's Exhibit 26. Will you look at that carefully and tell me if that is the application that you filled out this year? A. I believe so.

Q. And you signed it? A. I did.

Q. You filled out all the information that the document requires? A. I did. [3258]

* * * * *

Q. When did you talk to her again, if you did? Did you ever, after this conversation until the end of the season, again talk to Ella about the union?

A. I am not sure.

Q. Well, think hard.

A. I think that I had asked her a few questions in regard to the union before I told her about my signing of the pledge card.

Q. This is before the layoff? A. Yes.

Q. What did you ask her?

A. I just asked a few questions because I didn't know much about the union, and she had always said, "Well, that is everybody's own personal business."

Q. You weren't quite sure about this, is that it? You went to her and asked her what her opinion was?

A. No, I didn't ask her opinion.

Q. Well, what did you talk to her about?

A. I asked her if she thought the union would help the girls, and I remember asking her that.

(Testimony of Mary Elois Caddel.)

Q. Did you vote in the election that was held last year? A. Yes.

Q. Did you ever hear Ella Herrerias say that the company knew who was attending union meetings and had a list of them and they would be fired?

Mr. Karasick: I object to that.

Trial Examiner: Overruled.

The Witness: No.

Q. (By Mr. Berke): Did you ever hear Ella Herrerias say, or did she ever say to you that there was to be no talking about the union at work?

A. She never said that to me.

Q. Did you ever hear her say that to anyone else? A. No.

Q. Did you ever hear her say that those who would talk about the union while at work would be fired or blacklisted? A. No.

Q. Did she ever tell you that? A. No.

Q. Did you know Mrs. Herrerias before you went to work at the Sebastopol Apple Growers Union or Molino?

A. I had never seen her until I applied for work.

Mr. Berke: You may cross examine. [3256]

Cross Examination

* * * * *

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(Testimony of Mary Elois Caddel.)

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* * * * *

Q. When did you talk to her again, if you did? Did you ever, after this conversation until the end of the season, again talk to Ella about the union?

A. I am not sure.

Q. Well, think hard.

A. I think that I had asked her a few questions in regard to the union before I told her about my signing of the pledge card.

Q. This is before the layoff?

A. Yes.

Q. What did you ask her?

A. I just asked a few questions because I didn't know much about the union, and she had always said, "Well, that is everybody's own personal business."

Q. You weren't quite sure about this, is that it? You went to her and asked her what her opinion was?

A. No, I didn't ask her opinion.

Q. Well, what did you talk to her about?

A. I asked her if she thought the union would help the girls, and I remember asking her that.

(Testimony of Mary Elois Caddel.)

Q. Did she tell you it would?

A. She said that perhaps it would and perhaps it wouldn't. It was just for the girls to decide among themselves, that she knew nothing at all about the union. She wasn't for the union or against the union. [3265]

* * * * *

Q. Did you go to the meeting of the warehouse the day of the layoff? A. I did. [3268]

* * * * *

Q. Tell us what you can remember of that meeting as well as you can?

A. We had checked in and either Charley Williams or Ella Herrerias said that we were going to go over to the warehouse for this meeting. As we walked out of the plant, Ella said, "You can work tonight; come back and work."

So I went along with the other girls, and there was some discussion, but I was listening mostly to hear my name and wasn't listening to the girls and watching. [3269]

* * * * *

Q. You mentioned having seen decorated apples about Halloween time. Was that the first time you had ever seen them?

A. Yes. I have seen frequent apples, tiny apples, or Siamese apples, maybe laying around the machine.

Q. You mean that the girls would put them up somewhere to keep them from going through?

A. Yes. [3273]

* * * * *

WILLIAM A. OVERSTREET

a witness called by and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

* * * * *

Direct Examination

Q. (By Mr. *Karasick*): What is your occupation?

A. Manager of the Sebastopol Co-op Cannery.

Q. How long have you been manager of that cannery? A. Since the 1st of March, 1955.

Q. Prior to March, 1955, what was your occupation?

A. I was assistant manager of Stokely van Camp's plant 46 at Oroville, California. [3275]

Q. And was that a cannery? A. Yes.

Q. And for how long were you assistant manager of that cannery?

A. 1949 through 1955, March 1st.

Q. And when you began your job as manager of the Sebastopol Cannery in March of this year, did you continue in that capacity right up to the present time? A. Yes.

Q. Did the Sebastopol Co-op Cannery have a day and night shift this season? A. Yes.

Q. Is the night shift still working? A. No.

Q. When was it laid off? [3276]

* * * * *

Q. (By Mr. *Berke*): What part of September.

A. I would probably think it was in the middle.

Q. Was notice given to the employees of the layoff?

(Testimony of William A. Overstreet.)

Mr. Karasiek: I object to this specifically.

Trial Examiner: This is part of the offer? [3277]

* * * * *

A. In effect, as you would term a notice, no.

Q. When were the employees told that they were going to be laid off?

A. Well, specifically by management on the day of the layoff.

Q. Were they told prior to the day of the lay-off that there would be a layoff?

A. Not specifically, no.

Q. How were they given the notice of the layoff on the day of the layoff?

A. By the floorladies and the foreman in the plant.

Q. At whose direction was that done?

A. Mine, and also by a notice on the bulletin board.

Q. When was that notice put up?

A. The day of the layoff.

Q. When you worked as assistant manager of the Stokely van Camp's cannery at Oroville, did you have a day and night crew there—let's take the year 1954? A. Yes.

* * * * *

Trial Examiner: Yes.

Q. (By Mr. Berke): And tell us whether or not the night crew was laid off before the day crew was laid off? [3278] A. That is correct.

Q. And how were the employees informed of the layoff?

(Testimony of William A. Overstreet.)

A. By a notice on the bulletin board.

Q. And when was that notice put up on the bulletin board? A. The day of the layoff.

Q. If I were to ask you the same question with respect to the years prior to 1954, going back to the year 1949, when you were assistant manager, would your answer be the same? A. Yes.

Q. Mr. Overstreet, based upon your experience as assistant manager at Stokely van Camp for some five or six years, and your experience at Sebastopol Co-op Cannery this year, and your knowledge with respect to the layoffs, is there a reason why more notice is not given employees with respect to impending layoffs? A. Yes, there is.

* * * * *

The Witness: The management takes the position, and it [3279] has proven true over many years of experience, that when a night shift is going to be terminated, that if you give prior notice there is lots of your help that will not show up to finish out the season, so therefore, in all my experience with management, when you terminate a shift, night shift in a cannery, you normally give the notice on the day that the layoff is going to occur, and normally in the afternoon of the day of the particular shift. Therefore, you are assured that you will have a full complement of help up until the time that you terminate the shift.

Q. (By Mr. Berke): During the period of time that you were assistant manager for Stokely van Camp at Oroville, was there a union that repre-

(Testimony of William A. Overstreet.)

sented the employees as the collective bargaining agent? A. Yes. [3280]

* * * * *

Q. (By Mr. Berke): What union was it?

A. The AFL Teamsters, Cannery Workers Union. [3281]

* * * * *

EDNA ROSELLA HARDIN

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Berke): What is your occupation?

A. Floorlady at Manzana's.

Q. And how long have you been floorlady at Manzana?

A. This is my second year with a one year intermission.

Q. In 1954 were you floorlady at Manzana?

A. No.

Q. Where did you work in 1954?

A. SAGU.

Q. What capacity? A. As floorlady.

Q. When did you commence working for SAGU at 1954? A. In the middle of July. [3303]

Q. And did you go to work then as a floorlady or in some other capacity? A. As floorlady.

Q. On what shift? A. The day shift.

Q. Did you work throughout the season, 1954?

A. At SAGU?

(Testimony of Edna Rosella Hardin.)

Q. Yes; except for two weeks but not a floorlady all the time.

Q. Up until when did you work as floorlady?

A. October 4th.

Q. Then what took place?

A. I went to the hospital and I was off a week and came back, and I was in the cannery office for three weeks. Then on the inspection table for five more and back I became ill, and I quit a week before the season ended.

Q. You say after you were out a week you came back and worked in the cannery office at SAGU?

A. Yes.

Q. Where is that office located?

A. It is upstairs in the Cannery Building, main building.

Q. Is that the office where Mr. Duckworth is located? A. Yes.

Q. And have you worked for Manzana Products all this season? A. Yes. [3304]

Q. In the capacity of floorlady? A. Yes.

Q. When did you become floorlady at Manzana?

A. The 1953 season.

Q. Had you worked for Manzana prior to 1953?

A. Yes, I had.

Q. For how long? A. Four or five years.

Q. In 1953 while you worked at Manzana as a floorlady, did they have a day and night crew?

A. They did.

Q. And did the night crew work throughout the entire season along with the day crew? [3305]

* * * * *

(Testimony of Edna Rosella Hardin.)

Trial Examiner: I will permit the question.

Q. (By Mr. Berke): First let me ask you, before you answer that question, is Manzana a cannery?
A. Cannery and dryer.

Q. What do they can? A. Applesauce.

Q. In 1953 what did they can?

A. Applesauce.

Q. Will you answer the question as to whether the night crew, or the night shift in 1953 in the cannery worked throughout the same period as the day shift? [3306]

* * * * *

The Witness: No, it didn't.

Q. (By Mr. Berke): Which shift terminated first?
A. The night shift.

* * * * *

Q. (By Mr. Berke): How were the employees of the night shift notified that it was going to be terminated?

A. A notice was written on the blackboard that evening.

Q. By "that evening," are you referring to the same evening as the shift was to be terminated?

A. I am. [3307]

Q. Was there any prior notice given the employees, that is, before the evening when they were going to be terminated? A. No.

Q. Do you recall Mrs. Orice Storey?

A. Yes.

Q. Was she in the crew in 1954 at SAGU over which you were floorlady? A. She was.

(Testimony of Edna Rosella Hardin.)

Q. And do you recall her discharge on September 25? A. I do.

Q. What day of the week was that?

A. Saturday.

Q. Were you working an eight-hour day at that time?

A. On Saturdays we worked four hours.

Q. Had you had a conversation with Mrs. Storey that day? A. Yes.

Q. Did you have more than one conversation with her? A. Yes.

Q. How many, do you recall?

A. Two, I believe.

Q. When was the first conversation with her that day, approximately what time?

A. Somewhere around 11:00.

Q. And where did it take place?

A. At the trim table. [3308]

Mr. Karasick: This is on September 25?

Mr. Berke: Yes.

Q. (By Mr. Berke): Who was present in that conversation? A. She and I.

Q. And what was she doing at the trim table at the time? A. Trimming apples.

Q. Will you tell us what was said, please?

A. She said she had a headache and would like some tablets for it and I told her I would go and get them.

Q. Did you get them? A. Yes.

Q. Did you give them to her? A. Yes.

(Testimony of Edna Rosella Hardin.)

Q. When is the next time you had a conversation with her?

A. Not too long after that; 15 minutes or so later, on my next tour.

Q. Your next what?

A. Tour of inspection when I came around.

Q. And where did that take place?

A. Same place, trim table.

Q. Who was present at that time?

A. She and I and the trimmers.

Q. By the "trimmers" you mean other trimmers? A. They were just standing there.

Q. They took part in the conversation? [3309]

A. Not in the conversation, no.

Q. What was said then, will you tell us, please?

A. She said the tablets didn't help and she would like to check out and go to the car.

Q. What did you say?

A. I told her she could.

Q. Was that the end of the conversation?

A. Yes.

Q. Did you see her at the trim table after that?

A. No.

Q. Did you see her again that morning?

A. Yes.

Q. Where did you next see her?

A. In front of the time clock, four or five feet from the time clock.

Q. Four or five feet from the time clock, in what direction? A. Straight out from it.

Q. Where was the time clock at the time?

(Testimony of Edna Rosella Hardin.)

A. On the back wall, below the lab.

Q. Where was the lab then?

A. Upstairs, right next to the cannery office.

Q. And you say she was four or five feet out from it?

A. Yes.

Q. Well, what do you mean by that, out from it? Was she to the side or straight out or what? [3310]

A. Almost straight out from it.

Q. Were there any other people there with her?

A. Some were around her.

Q. And did you see Mr. Duckworth about that time?

A. About that time.

Q. Did Mr. Duckworth talk with you?

A. Well, a few minutes later.

Q. Will you tell us where you talked with Mr. Duckworth?

A. Well, he was on the balcony, and he motioned for me to come up and I started up the stairs and he started down. He met me on the stairs and talked to me there.

Q. Who was present at that point?

A. Mr. Duckworth and I.

Q. Will you tell us what the conversation was?

A. He asked me if Mrs. Storey had checked out and to ask her to leave, and I told him I would check her card and I went down to the time clock then.

Q. And did you check her card?

A. I looked at her card, yes.

Q. And what did it indicate?

(Testimony of Edna Rosella Hardin.)

A. That she had checked out and I turned around to tell him so.

Q. Where was he at that time?

A. Right behind me.

Q. And did you tell him? [3311]

A. I told him she had checked out.

Q. Then what took place?

A. And he asked her to leave then.

Q. Did you hear the entire conversation between Mrs. Storey and Mr. Duckworth?

A. No; I didn't.

Q. What did you do?

A. I left. I was busy.

Q. Tell us whether or not, Mrs. Hardin, there was a rule with respect to standing or congregating in the cannery?

A. There was a rule that they weren't supposed to, before checking-in time.

Q. When did you learn about this rule?

A. A day or two after I started to work in July.

Q. And who told you about it?

A. Mr. Duckworth. [3312]

* * * * *

Q. (By Mr. Berke): Well, when Mr. Duckworth told you about the rule, when you started to work back in July of 1954, what did he say to you?

Mr. Karasick: Object to that.

Trial Examiner: Overruled.

The Witness: He didn't want people around because the tow motor was going back and forth, fork-lift.

(Testimony of Edna Rosella Hardin.)

Q. (By Mr. Berke): Is there anything else he said to you about that?

A. They were lifting the bells and he was afraid someone might get hurt.

Q. Mrs. Hardin, did you at any time threaten or warn employees about joining or assisting the Teamsters Union or any union?

A. No; I didn't. [3313]

* * * * *

Q. (By Mr. Berke): Did you, in the latter part of July or the early part of August, 1954, or at any other time, warn and threaten employees with loss of employment or employment benefits if they joined or assisted Local 980 or any other union?

A. No.

Mr. Karasick: I object.

Trial Examiner: Overruled.

Q. (By Mr. Berke): Mrs. Hardin, did you between September 24, 1954 and October 19, 1954, or at any other time, threaten and warn employees that they would be discharged if they joined or assisted Local 980 or another union, any other union?

A. No.

* * * * *

Q. (By Mr. Berke): Mrs. Hardin, Mrs. Storey testified in the [3314] proceedings before the Trial Examiner here that about six weeks before September 25, you saw Marjorie Bird's dolls made out of apples and said, "Marjorie makes the prettiest dolls of all."

(Testimony of Edna Rosella Hardin.)

Did any such thing take place and did you make any such statement? A. No.

Q. Lila Lyman testified here that in the latter part of September you told her she made a very pretty apple doll. Did you tell Mrs. Lyman that?

A. No.

Q. Did you see any apple doll made by her?

A. No.

Q. Marjorie Bird testified in this proceeding that she decorated apples all the time; that you more—all the time that she was at SAGU, and that you more than once said they were cute.

Q. Did you ever say that to her? A. No.

Q. Did you ever see any apples that Marjorie Bird decorated? A. No.

Q. Marjorie Bird also testified that Mrs. Storey made a square apple and you went around with it. Did you see a square apple made by Mrs. Storey?

A. I don't recall.

Q. Did you go around with an apple made by Mrs. Storey made into a square? [3315]

A. No.

Q. Have you ever gone around with an apple among the girls in the plant when you worked there last year? A. Yes.

Q. What kind of an apple was that?

A. One that was improperly trimmed.

Q. And what was your purpose in going around?

A. To ask them to remove the blossom end or rot, or whatever had been forgotten to have been removed.

(Testimony of Edna Rosella Hardin.)

Q. Do you know a Joan Schwartz who, at the time she worked at SAGU, was known as Joanne Chames? A. Yes.

Q. She testified here that she asked you if Mrs. Storey was fired and you said yes, they couldn't have that kind of people around talking about the union.

Did you ever tell Mrs. Chames that?

A. No.

Q. Or Miss Chames that? A. No.

Q. Did you have a conversation with Miss Chames concerning Mrs. Storey? A. Yes.

Q. And when did that take place?

A. Just after quitting time, September 25.

Q. And where did it take place? [3316]

A. At the clock.

Q. Who was present at the time?

A. Joanne Chames, Eloyce McPhee and myself.

Q. And what were you doing at the time?

A. I was checking the time cards.

Q. Just the three of you present? A. Yes.

Q. Will you tell us what was said, please?

A. Joanne asked me if Mrs. Storey was fired and I told her she must be because her time card was missing.

Q. Was there anything else said?

A. When Joanne kept talking, I was busy and wasn't paying too much attention to her.

Q. Did you say anything more?

A. Not that I recall.

Q. Did you ever talk with Mrs. or Miss Chames

(Testimony of Edna Rosella Hardin.)

—I guess it is Miss Chames, about the union on any other occasion? A. Yes.

Q. Do you recall about when?

A. In the first part of September, I believe.

Q. And where did that take place?

A. At the trim table.

Q. Who was present at the time?

A. She and I. [3317]

Q. And will you tell us what the conversation was?

A. She asked me if I thought the union would get in and I told her I hoped not.

Q. What were you doing at the trim table at that time?

A. Sometimes I was helping to relieve at recess time, and Joanne used to work with me and sometimes I was just making my tour of inspection to see that everyone was trimming the way they should.

Q. On this particular occasion do you recall what you were doing?

A. I believe I was helping trim.

Q. Who opened the conversation about the union? A. Joanne.

Q. And is that all that was said?

A. She asked me about it and I told her why I didn't think it would help them.

Q. What did you tell her?

A. I told her I didn't think in seasonal work that the employees would be benefited by the union,

(Testimony of Edna Rosella Hardin.)

that with the additional dues and initiation, I didn't think they would be helped out at all.

Q. Is that all the conversation between you?

A. Yes.

Q. Do you know a Gertrude Jones?

A. Yes. [3318]

Q. Who was she? A. She was a trimmer.

Q. Where did she work? A. At SAGU.

Q. What shift? A. Day shift.

Q. Did you have a conversation with her about the union? A. Yes.

Q. When did that conversation take place?

A. Middle of September.

Q. And where did it take place?

A. At the trim table.

Q. Who was present at the time?

A. She and I.

Q. And do you recall what you were doing at the trim table then?

A. I was coming by, inspecting them, telling the ones that go out for recess.

Q. About what time was this?

A. In the morning.

Q. Will you tell us the conversation, please?

A. She asked me about signing the pledge card and she said she hadn't yet and if the union got in, she didn't want to be without a job, so I told her if she wanted to sign a pledge card that it was entirely up to her, that she could go ahead [3319] and do so if that is what she wanted.

Q. Was there anything more said between you?

(Testimony of Edna Rosella Hardin.)

A. No.

* * * * *

Q. (By Mr. Berke): Did you know Mr. Storey?

A. Yes.

Q. Where did he work last year?

A. At SAGU.

Q. In what capacity? A. Dumper.

Q. And where was his position or station as a dumper?

A. At the grater, just outside the cannery door.

Q. Were there any women that worked out there that were under your supervision?

A. Yes. [3320]

Q. What did they do? A. Sorted apples.

Q. Did you during 1954 have occasion to talk to the women that worked under you about the way they were sorting apples? A. Yes.

Q. When did you have occasion to do that?

A. The first part of August.

Q. Can you be a little more specific? What do you mean by the first part of August?

A. First week or so of August.

Q. Do you recall who was working out there among the girls at the time?

A. Well, Georgia Howes, and I don't recall the woman's name that came over from the packing house with her, and I believe Mrs. Pinkston and her daughter.

Q. And was Mr. Storey working there at the time? A. Yes.

Q. Were those the people that were present at

(Testimony of Edna Rosella Hardin.)

the time you talked to them about the way the sorting was being done? A. I think so. [3321]

* * * * *

Q. (By Mr. Berke): What did you say or what was said?

A. I went out and asked them why they weren't getting out more of the worms that were in the bad apples, that they weren't getting out nearly enough.

Q. Go ahead.

A. And the girls said they couldn't get out any more than they were because Mr. Storey was dumping too fast for them.

Q. Did you observe how he dumped?

A. Yes.

Q. And what did you see?

A. That he dumped faster than the girls could pick out the bad apples.

Q. Were these girls, from your observation, working slowly or were they working as they should be working? [3322]

* * * * *

The Witness: That they were working quite rapidly.

Q. (By Mr. Berke): Did you take that subject up with anyone concerning Mr. Storey's dumping of the apples? A. With Mr. Duckworth.

Q. When did you do that?

A. Later the same day.

Q. Did you have another occasion to be concerned with Mr. Storey's dumping of apples during the 1954 season? A. Yes.

(Testimony of Edna Rosella Hardin.)

Q. About when was that?

A. In mid-September or a little bit after the middle of September.

Q. And were any of the women under your supervision working out there near the dumping station? A. Yes.

Q. Who were they, if you recall?

A. Georgia Howes was still out there, but I don't recall who the others were because they came and went; different ones were put out there.

Q. What did Georgia Howes do out there at that time?

A. She was taking penetrometer readings.

Q. And what was the problem at that time?

A. That Mr. Storey was tossing his boxes and that they were coming close to the girls and one of them had got her legs scratched by a box. [3323]

Q. Did you observe the manner in which Mr. Storey was handling the boxes at that time?

A. Yes.

Q. What did you say?

A. That he would give the box a toss.

Q. Give what?

A. The box a toss and that it would tumble down near the girls or wherever it happened to land.

Q. Were these empty or full boxes?

A. Empty boxes.

Q. What sort of boxes were these, do you remember?

A. I believe they are called L. A. lugs.

(Testimony of Edna Rosella Hardin.)

Q. And what was he supposed to do with the boxes, to your knowledge? A. Put them down.

Q. Put them down where?

A. To the side of him, to be taken away on a little hand truck.

Q. Were they to be put down in any particular manner? A. I don't know.

Q. Did you take up the matter of his handling the boxes with anyone? A. Yes.

Q. With whom? A. Mr. Duckworth.

Q. When did you do that? [3324]

A. That day. [3325]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Karasick): While you were floor-lady during the last season at SAGU, you saw apples that were decorated from time to time, did you not? A. A few, yes. [3326]

* * * * *

Q. This wasn't uncommon for the women occasionally to decorate an apple when there would be a break down in machinery or maybe a lull in some other break, was it?

A. I never noticed them often, no.

Q. But it wasn't unusual?

A. Well, three or four throughout the season is about all I ever noticed.

* * * * *

Q. You never discharged any employee for decorating an apple? [3327] A. No.

Q. Or for plugging an apple?

(Testimony of Edna Rosella Hardin.)

A. To my knowledge, I never saw any plugged apples. [3328]

* * * * *

Q. Do you remember some employees by the name of Fanny Garrison? A. Yes.

Q. And Gloria Pate? A. Yes.

Q. Gloria Lindsay? A. Yes.

Q. And do you remember that when the talk first started, you discovered these three employees were agitators for the union? A. Yes.

Q. And you talked to Mr. Duckworth about it and you told him? A. Yes.

Q. And that was about the time it started out there, the [3330] latter part of July or early August? A. Yes.

Q. Do you remember when it was more exactly, the date? A. I don't remember the date.

Q. And Ella Herrerias was a floorlady on the night shift? A. Yes.

Q. And do you remember her telling you that she had got rid of some employees on the night shift who were agitators for the union?

A. Yes.

Q. And do you remember their names?

A. Sarah Lindsey.

Q. Who else?

A. Her daughter-in-law, and I don't know the other woman's name.

Trial Examiner: Whose daughter-in-law?

The Witness: Sarah Lindsey.

(Testimony of Edna Rosella Hardin.)

Q. (By Mr. Karasick): Then the daughter's name was Lindsey too?

A. Yes. I think her first name is Dolores, but I am not sure.

Q. And do you remember the other girl's name?

A. No.

Q. When was it that Ella told you this?

A. On the phone; she phoned me after she had laid them off.

Q. And do you remember when that was? [3331]

A. In September, I do believe, middle of September. [3332]

* * * * *

Q. Do you remember a number of the employees expressing confusion as to whether they should go back and work on the day shift or whether they shouldn't that night?

A. The day shift was over.

Q. The night shift. Do you remember a number of the employees on the night shift saying they didn't know whether they should go back to work or not? [3346]

A. No.

Q. You didn't hear any discussion at all about employees that night?

A. No.

* * * * *

Q. And after it was over you went out and these employees gathered in various groups and some of them went away and some didn't, right?

A. I didn't see them.

Q. What did you do?

A. I went into the cannery.

(Testimony of Edna Rosella Hardin.)

Q. And what did you do then?

A. Went to receive the caps and gloves, aprons.

Q. Turning in your—

A. Those that were returning theirs and I was to give them their slips.

Q. And at the meeting the employees were told that those who were laid off could return their caps and aprons and get a refund for the deposit; is that right? A. Yes.

Q. And you did that, along with the others?

A. Yes. [3347]

* * * * *

Redirect Examination * * * * *

Q. (By Mr. Berke): Referring now to the question Mr. Karasick asked you about a telephone call or conversation with Mrs. Herrerias concerning three people who were laid off? A. Yes.

Q. Did you say anything to Mrs. Herrerias at that time? A. Yes.

Mr. Karasick: Object. [3348]

Trial Examiner: Overruled.

Q. (By Mr. Berke): What did you say?

A. That I had been told by Mr. Duckworth not to lay off anyone that was in sympathy with the union.

Q. You say that Steve Struempf gave you orders, Mrs. Hardin? [3349]

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Recross Examination * * * * *

Q. (By Mr. Karasick): Some employees would

(Testimony of Edna Rosella Hardin.)

work for a while, would leave, would come back and work again, wouldn't they, during the season?

A. A few of them.

Q. And this made no difference to you if they were good employees or otherwise, you would take them back and put them on and let them work?

A. If they were gone over three days we turned their time cards in and they no longer had a job if they wouldn't notify us as to a reason.

Q. And if they came back later and asked you for a job and they were good employees you might put them back? [3354]

A. I had no occasion to do so. [3355]

* * * * *

Q. (By Trial Examiner): Well, did I understand from your last answer that employees might be out 3 or more days, then come back later and tell you why they had been out?

A. They would or were to tell us before the three days were up, because they all understood that if they were out three days they no longer had a time card, that we would take the time card out of the rack and turn it in at the office. [3356]

* * * * *

Q. (By Trial Examiner): Do you remember an occasion not long after the union started to organize at SAGU last year when Mrs. Storey invited you to attend a union meeting? A. Yes.

Q. Do you remember the date?

A. No; not the date.

(Testimony of Edna Rosella Hardin.)

Q. Do you remember where Mrs. Storey was working at that time?

A. She was grading apples, sorting apples at the time.

Q. Out in that same line?

A. Yes; with her husband at that time.

Q. So she was one of the women who was in that group that had complained about Mr. Storey's working too fast?

A. She never complained when she was out there.

Q. Were the others who did complain there at that time? [3359]

A. I don't know. They weren't working at the time she asked me about the union meeting, but she was out there. That is where I was when she talked to me.

Q. What I am trying to get at is this: Was the complaint that was made about Mr. Storey made about him at the time when Mrs. Storey was out grading? A. No.

Mr. Berke: I didn't understand that Mrs. Storey was grading.

The Witness: Sorting. She worked out there occasionally at the grader.

Q. (By Trial Examiner): Was it before or after she was out there?

A. Both. The first complaint was before she was out there, and the later complaint after she had worked in at the trim table.

(Testimony of Edna Rosella Hardin.)

Q. Do you remember when she was put out there the first time?

A. No. We had girls come over from the packing house that were, you might say loaned to us, and they were out there and she worked out there for a while and because she was a fast trimmer, we had her work inside trimming apples.

Q. Was it near the beginning of the season that she was put out there? A. Yes. [3360]

Q. And then she was brought in?

A. Brought inside.

Q. And she was never put outside again?

A. Only when we needed her, if I was short.

* * * * *

Q. And there was a whistle blown at the beginning and end of the lunch hour; is that right?

A. Yes.

Q. Do you recall that for a while last season there was a short whistle or warning blown to tell people about 7 minutes, 5 or 7 minutes beforehand to tell them to get ready to punch timecards?

A. No. [3368]

* * * * *

Mr. Berke: I moved to strike from the Complaint in Paragraph 6 thereof, Sub-Paragraph 22, the allegation reading:

"Between October 9th and October 15, 1954"—the exact date being unknown—"Norman Daniel Schuster threatened and warned employees that the respondent would close down the plant and cease operations if they joined or assisted the union."

I made that motion on the ground there is no evidence to support that allegation.

Trial Examiner: Well, it is really a motion to dismiss rather than strike. [3370]

Mr. Berke: That is right.

Trial Examiner: I will grant the motion. [3371]

* * * * *

ELMO MARTINI

a witness called by and on behalf of the Respondent, having been previously duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Berke): Mr. Martini, you have been previously sworn, so you understand you are still under oath? A. Yes.

Q. And you are the same Mr. Martini who previously identified himself as being manager of the Sebastopol Apple Growers Union?

A. That is right.

Q. I show you, Mr. Martini, General Counsel's Exhibit 26, which is in evidence as an application form used by SAGU this year. Is that the form that was used for all applicants for employment this year? A. Yes.

Q. When was that form put into use by SAGU?

A. Sometime in June. [3375]

Q. Of 1955? A. Yes.

Q. How did that form come to be adopted by SAGU?

A. Early in May we had an industry meeting,

(Testimony of Elmo Martini.)

and I recall that I mentioned to someone at the meeting there that I was about out of employment forms, and since they were so brief, I was going to see if I could find a new form that would be a little more complete.

Then I recall Mr. Butler of Speas Company mentioned that he had been using a form that he thought would be all right, and during another meeting, I think probably later on in the month, the early part of June, Mr. Caldwell was there and he told me that they had kind of a form there that they used generally throughout the industry, and shortly thereafter I was either brought up a form or sent one and adopted it from that point.

Trial Examiner: You mean Mr. Caldwell gave you one?

The Witness: Yes; I don't recall whether he brought it up, Mr. Hemingway, or whether it was sent up to me. I don't recall that.

Q. (By Mr. Berke): To your knowledge, have other canneries in the Sebastopol area employed or used this form?

Mr. Karasick: Object; it is immaterial and irrelevant.

Trial Examiner: I am going to let it in. [3376]

The Witness: Yes; as far as I know, most of the industry is using that form.

* * * * *

Q. (By Mr. Berke): Do you know whether the Hallberg Canning Corporation is using that form?

A. Yes, they are.

(Testimony of Elmo Martini.)

Q. Do you know whether Sebastopol Co-op Cannery is using that form?

A. Yes; I am sure they are.

Q. And do you know whether Silvera & O'Connell are using that form?

A. Yes; I am positive they are using it.

Q. Do you know whether Manzana Products, Inc., is using that form?

A. I am not sure whether they are or not, but they were at the meeting when the form was adopted. I don't know whether they are, though.

Q. Can you of your own knowledge tell us of any others that [3377] you know of that are using that form?

A. I know that our Pleasant Hill Dryer is using it, and I believe the Barlow Company is using it, and Speas Company.

Q. Mr. Martini, was there any discussion at this meeting where the form was discussed, or did you have any discussion with Mr. Caldwell in which the matter of using this form was discussed at which it was said by anyone that this form will be used for the purpose of trying to find out whether people belonged to any labor organization or not?

Mr. Karasick: I object on the ground it is leading and suggestive, among other reasons.

Trial Examiner: Overruled.

The Witness: No; there wasn't. [3378]

* * * * *

ELLA HERRERIAS

a witness called by and on behalf of the Respondent, having been previously duly sworn, was examined and testified as follows: [3396]

* * * * *

Direct Examination

Q. (By Mr. Berke): Mrs. Herrerias, you are still under oath from your previous appearance before the Trial Examiner? A. Yes.

Q. And you are the same Mrs. Herrerias who was identified here as having been the floorlady in 1954 at the Sebastopol Apple Growers Union?

A. Yes.

Q. Mrs. Herrerias, there was testimony offered here by a witness for the General Counsel that about three weeks before October 15, in the cannery, either during recess or 4:00 p.m., a number of employees were talking about the union and that you said at that time, "Don't get my girls excited or you will all get blackballed around here, and you will get laid off if you don't quit talking about the union."

Q. Did you say any such thing then or at any time?

A. I did not.

Q. There was also testimony by General Counsel's witness that several nights after that in the ladies' restroom at about 4:55 p.m., and there were others present, that you said, "If you don't quit talking about the union you will all get fired; wait until the union gets in here and if you think I am tough, wait until the union gets in here."

(Testimony of Ella Herrerias.)

Did you say any such thing?

A. Definitely not.

Q. Did any such occurrence take place? [3397]

A. Never.

Q. In the ladies' restroom or any other place?

A. No, sir.

Q. A witness for the General Counsel testified that you told her that a few were going to be kept on after October 15 because they had been there the longest.

Did you tell anyone that?

A. No, sir.

Q. Did you tell any employee that?

A. No, sir.

Q. At any time prior to October 15?

A. No, sir, because I didn't know anything about it.

Q. Did you make any such statement after October 15? A. No.

Q. Another witness for the General Counsel, Mary Ann Russell, testified that in a conversation during a break near the benches in front of the ladies' lounge, you said if any of them talked and signed pledge cards they would lose their jobs.

Q. Did you so state to anyone at that time or at any other time?

A. No, sir.

Q. The same witness testified that you said on the same occasion that if they attended union meetings there would be someone there from the company and they would come back and report those

(Testimony of Ella Herrerias.)

meetings and those at the meeting would lose their jobs. [3398]

Did you say that to Mary Ann Russell or anyone else on that occasion?

A. I have never spoken to that girl.

Q. Did you say that to anyone else other than Mary Ann Russell then or at any other time?

A. No, sir.

Q. Did you attend any union meetings?

A. Never.

Q. To your knowledge, did anyone representing management attend any of those union meetings?

A. No.

Q. Erma Bate testified here that about a week or ten days before the layoff that you told her and Ernestine Hack, or in the presence of Ernestine Hack, that if "this place goes union, we are going to close down; that already six weeks of apples have gone to the Co-op because of the union."

Did you say that to Erma Bate?

A. I definitely did not.

Q. Did you ever make a statement to anyone, whether it is Erma Bate, Ernestine Hack or anyone else?

A. No, sir.

Q. Were you told by anyone representing management that apples had gone to the Co-op because of the union?

A. No, sir. [3399]

Mr. Karasick: Just a moment; object and move to strike.

Trial Examiner: Overruled; denied.

Q. (By Mr. Berke): Erma Bate further testi-

(Testimony of Ella Herrerias.)

fied in this proceeding that a few days before the layoff—you remember the time of the layoff?

A. I do.

Q. She testified that a few days before the lay-off you told her you were making up a list and all those who would stick with you would be assured of jobs, "otherwise they would be blackballed from here down south."

Did you say any such thing?

A. I certainly did not.

Q. Whether to Erma Bate——

A. To nobody.

Q. Did you make such a list up?

A. No, sir, I didn't.

Q. Ernestine Hack testified that about in the middle of September you told her that there was some weeding out to be done. Did you make any such statement to her?

A. No; I don't recall making any statement like that; no, I don't.

Q. You don't recall or you didn't, which is it? I am not clear from your answer.

A. No; I am sure I didn't, because there was not reason for me to make a statement. [3400]

Q. Did you ever say that to anyone else, whether it was Ernestine Hack or someone else?

A. No, sir.

Q. Erma Bate further testified that on Saturday, October 16 at your home you asked her why she didn't come to the office and told her that her name was on the list, and you further said to her,

(Testimony of Ella Herrerias.)

"You could get me in a lot of trouble because I confided in you. Martini doesn't trust you because your husband is a strong union man."

Did you have any such conversation with Erma Bate on October 16 at your home?

A. We had no conversation of any description. She just came in, dropped the list. I asked her, "Would you have a cup of coffee," because I was in the kitchen. She said, "No, I am in a hurry," and that was all that was said.

Q. Did you ever state that to her whether it was on Saturday, October 16 at your home or elsewhere? A. No.

Q. By the way, Mrs. Herrerias, was, to your knowledge, Erma Bate heavier in weight than she is at the present time? A. Oh, yes. [3401]

* * * * *

Q. Under what—did you know what her approximate weight had been in 1954?

A. Well, I would guess between 190, 200, somewhere around there.

Q. And she has since, to your knowledge, lost considerable weight, has she?

A. She told me herself she had lost 80 pounds.

* * * * *

Q. (By Mr. Berke): Mrs. Bate further testified here that a few days after October 18 you told her there was still some union people in there, "and I intend to get rid of these troublemakers too."

Did you ever tell her that?

(Testimony of Ella Herrerias.)

A. No, sir; I did not.

Q. Did you ever tell her anything that would indicate to her that you were trying to convey to her that you were going to get rid of them? [3403]

A. No.

* * * * *

Q. Pauline Ploxa testified about two or three weeks after going to work for SAGU, she telephoned you to inquire if there was going to be trouble about the union at the cannery?

Was there such a call?

A. She phoned to tell me that she would not be at work, that [3404] she couldn't come to work, nor Mrs. Rawls. There was nothing——

Q. Mrs. who?

A. Rawls, I believe. They wouldn't be to work, and so I told her it was perfectly all right, and I thanked her for the phone call. Then as I was about to hang the receiver, she said to me, "I have something I want to tell you." I said, "What is it?" And then she spoke to me about this Mary Seidel.

Q. What did she say?

A. She told me that she had come from the Co-op and to be on the lookout for her, that she was a troublemaker. I told her I didn't know who Mary Seidel was; I had no idea who she was. So she proceeded to describe her to me and told me that she was very strong union and to be very careful of her. I told her that I wasn't interested; the woman was doing her work and I didn't know any-

(Testimony of Ella Herrerias.)

thing about her, and as long as she was doing the work it didn't make any difference to me.

* * * * *

Q. Pauline Ploxa further testified that in the course of that conversation you said to her, "It is best to keep away from union meetings because Mr. Martini is going to shut this place down if you go to meetings." A. No, sir.

Q. Did you ever tell her that? [3405]

A. No, sir; I didn't.

Q. Whether it was in a phone conversation?

A. No, sir.

Q. Or face to face or otherwise?

A. No, sir.

* * * * *

Q. (By Mr. Berke): She testified that on that occasion, on Tuesday, October 12, while she was on the slicing machine, you asked her in Spanish if she would go to a union meeting tomorrow and tell you who from the plant would be there. [3406]

She further said that she replied she wanted to know what you were going to do if she told you, and you said you would give the list to Martini and he would fire them.

And then Pauline said she told you she didn't know the names of the women and you said, "You go and take notice of who is there and come back and point them out to me."

Did you have such a conversation with her in Spanish on that occasion?

A. No. What took——

(Testimony of Ella Herrerias.)

Q. Wait a minute before you get to that. Did you have such a conversation with her on that occasion in English?

A. Yes. I made my rounds, as I started to say, as I usually do. She was at the slicing machine and she was sitting there staring off into space, and I just approached her like I do all the ladies, and I just said to her, "What is new," or "What is on your mind," or something like that.

She turned around and said to me, "I was just thinking." She said, "I don't know, there is a meeting tomorrow night,"—or "tomorrow," I don't remember which—but, "There is a meeting tomorrow; I don't know if I should go or not," and I said, "Well, why not?" "Well," she said, "I don't know. On second thought I believe I will go." She said, "I will see who is there and I will let you know."

Q. And what did you say?

A. I said, "I am not interested," and that was all the conversation. [3407]

Q. Did she let you know?

A. I don't know if it was a day or two, I did the same rounds and I happened to stop and talk to her and I happened to say to her, "What is new," like I do with all the ladies, and she in turn answered me in Spanish. She said, "Don't say anything because I don't want Mrs. Rawls to understand." I said, "I don't know what you are talking about."

Q. What was said?

(Testimony of Ella Herrerias.)

A. Nothing was said at all.

Q. Was that all? A. That is all.

Mr. Karasick: Will you mark that place in the record, please.

Q. (By Mr. Berke): Mrs. Ploxa further testified here that the next day—that is after this alleged conversation on Tuesday, the 12th, shortly after she came to work that you came to her at the slicing machine and asked her in English on that occasion to go to the ladies' room and she did not want to go. She said that 15 minutes later you came back and asked her again and she said to you then that they were too flooded with apples, but she would meet you in the ladies' room at 4:30 p.m.

Do you have any such—did you have any such conversation with her?

A. There was nothing to that at all. [3408]

Q. Did you make such a request of her?

A. No, sir; I never requested anything.

Q. She further testified that at 4:30 p.m. she met you in the ladies' room where a conversation took place in Spanish and that you asked her to tell her who was at the union meeting, and that she said she couldn't tell you and that you insisted and then went to the door of the restroom, opened it and said, "Now point out which ones." And she said she pointed to Clara Davello, and she said that Clara was there and that you then said, "I am not worried about her."

Was there any such conversation or any such occurrence?

(Testimony of Ella Herrerias.)

A. Never; nothing like that ever occurred.

Q. She further testified that on that same occasion in the ladies' restroom that Mary Chiquita went by and that Pauline said to you that she was there and you said this: "Oh, her, she is nothing."

Did any such occurrence take place?

A. Absolutely not. I don't even know Mary Chiquita. I don't know anything about that.

Q. Did any such occurrence take place?

A. No, sir. Mr. Berke, may I say something? I never spoke to that lady off the platform, only just what I have said here.

Q. What lady? A. Mrs. Ploxa. [3409]

Q. On the same occasion Pauline Ploxa further testified that you asked for more, and Pauline said, "There will be a man here tomorrow to pass out buttons and he will see you," and that you then patted her on the shoulder and told her, "Well, you don't have to worry, you and Dora will have a job at the company."

Did any such thing occur?

A. No, sir.

Q. Was there any such conversation?

A. Absolutely not because I knew absolutely nothing about buttons or anything else.

Q. Did she tell you anything about a man coming out? A. No, sir.

Q. And that there will be buttons passed out?

A. No.

Q. Whether it was on October 13 or any other day, did such an occurrence and such conversations

(Testimony of Ella Herrerias.)

take place between you and Pauline Ploxa in or near the ladies' dressing room? A. No, sir.

Q. Or restroom? A. No, sir.

Q. Mrs. Ploxa further testified that the next day after this alleged occurrence in the ladies' restroom, that you came up to the slicing machine and asked her and Dora Rawls where their union buttons were. [3410]

Did such an occurrence take place?

A. No, sir.

Q. Did you ever ask them about their union buttons? A. No.

Q. Or did you ever ask Ploxa and Rawls where their union buttons were?

A. I didn't, no, sir.

Q. Mrs. Ploxa further testified that a little while later on that occasion of the alleged inquiry as to their union buttons, that you were seen by her on the balcony in the cannery with a pad and pencil in your hand, that you were standing there with Mary McGuire and some man and that you were looking down at the women and writing, looking and writing, looking and writing.

Did any such thing take place?

A. No, sir.

Q. Did you make a note at any time of the women who were wearing union buttons?

A. No, sir.

Q. Did you have anyone else make a note for you of any of the women wearing union buttons?

A. No, sir. [3411]

* * * * *

(Testimony of Ella Herrerias.)

Cross Examination

* * * * *

Q. (By Trial Examiner): When you previously testified here you were asked about going to a party at the Chapman's, or somebody like that, on the evening of October 16; do you remember that?

A. Yes.

Q. Was that the correct name, Chapman?

A. Chapson, Chapman. I think it is C-h-a-p-m-a-n.

Q. I want to avoid any confusion. There were people employed at the plant named Chapman and Chapson. So I want to determine which one of the two it was.

A. I think it was Louise Chapson.

Q. Was it at her house? A. Yes. [3454]

Q. And if you said Chapman's house, then you meant Mr. Chapson's house?

A. Mr. Chapson's house, that is right.

* * * * *

Q. (By Mr. Karasick): Mrs. Herrerias, again I direct your attention to the party of Louise Chapson that you attended last season? [3455]

Just to get the record clear here, you did not attend any party last season at an Orlin Chapman's house, did you? A. No, sir.

Q. O-r-l-i-n Chapman?

Trial Examiner: That is the way it was spelled in the transcript, but on the exhibit it is Orland, O-r-l-a-n-d.

Q. (By Mr. Karasick): But you didn't attend

(Testimony of Ella Herrerias.)

a Mr. Chapman's house at a party last year at all, did you?

A. I don't know anybody by that name at all.

* * * * *

MARY CASTINO

a witness called by and on behalf of the General Counsel, National Labor Relations Board, being first duly sworn, was examined and testified as follows: [3482]

* * * * *

Direct Examination

Q. (By Mr. Karasick): Mrs. Castino, directing your attention to October 15, 1954, the day of the reduction to one shift at the SAGU plant last year, did you attend a meeting of the warehouse that day? A. Yes, sir.

Q. Was anybody immediately with you attending with you?

A. Well, several women were with me.

Q. Who were they? A. One was——

Q. Who was near you at the time?

A. Gloria Pate.

Q. Anyone else?

A. Well, several other women. I just don't recall who they were, but a whole group of us came out of the cannery and into the warehouse.

Q. Was your name on the list for those to be retained? A. Yes, sir.

Q. Did you hear Gloria Pate's name read?

A. Yes, sir, I did. [3483]

* * * * *

EDNA ROSELLA HARDIN

a witness called by and on behalf of the General Counsel, National Labor Relations Board, having been previously duly sworn, was examined and testified further as follows: [3526]

* * * * *

Direct Examination * * * * *

Q. (By Mr. Karasick): Do you recall that on one occasion last year, Mrs. Hardin, you fished a mouse out of the water that you had heard Mr. Bondi had placed in there from the outside?

A. I was told he had placed the mouse in there. I did fish a mouse out of the water that I was told Mr. Bondi had caught. [3529]

* * * * *

Q. (By Mr. Karasick): Do you recall testifying previously that when Ella told you about these three girls you told her that "you weren't supposed to fire union people"? A. Yes.

Q. And you recall that she told you that she didn't do that? A. Yes. [3530]

* * * * *

EUSEBIA CARRERA

a witness called by and on behalf of the General Counsel, National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Trial Examiner: Will you state your name, please?

The Witness: Eusebia Carrera.

Direct Examination

* * * * *

Q. (By Mr. Karasick): Mrs. Carrera, did you work for Sebastopol Apple Growers Union last year? A. Yes.

Q. What was your job?

A. Peeler, trimming.

Q. And what shift? A. Night. [3536]

Q. Did you sign a union pledge card last year?

A. I voted for the union.

Q. You signed a pledge card? A. No.

Q. You didn't? A. No.

Q. Did you go to a meeting in the warehouse October 15, 1954 when they read a list of names of people to remain at work? A. Yes.

Q. Was your name read? A. Yes.

Q. Did you go back to work the next Monday, October 18? A. No.

Q. Did you work after that at all? A. No.

Q. Did you tell anybody to tell them at work that you were not coming back?

A. Yes; I told the lady.

Q. You told a lady to tell them?

(Testimony of Eusebia Carrera.)

A. Yes. [3537]

* * * * *

Q. (By Mr. Karasick): You didn't go back, you say, to work on the 18th? A. No.

Q. Why didn't you?

A. Because I had to stay home and take care of my children.

Q. When you worked on the night shift, who took care of the children? A. My husband.

Q. When did he work, day or night?

A. Days.

Q. So I understand the last time you worked at the plant was October 15, 1954? A. Yes.

Mr. Karasick: Your witness. [3538]

Cross Examination

* * * * *

Q. (By Trial Examiner): Did you actually work on the night of the 15th, Friday?

A. Yes; I worked that night because I had no way to come home.

Q. You worked until the end of the shift?

A. Yes.

Q. (By Mr. Berke): You went back to your job right after the meeting in the warehouse?

A. Yes.

Q. And finished that night?

A. Yes. [3539]

* * * * *

ERNESTINE ALBINI

a witness called by and on behalf of the General Counsel, National Labor Relations Board, having been previously duly sworn, was examined and testified as follows: [3574]

* * * * *

Direct Examination

Q. (By Mr. Karasick): Miss Albini, you testified previously that you worked in the office of the respondent Sebastopol Apple Growers Union?

A. Yes.

Q. Last year and part of this year; is that right?

A. Yes.

Q. While you were there last year, prior to the election, you were asked to type up a list of employees, were you not?

A. Yes, sir.

Q. I hand you General Counsel's Exhibit 36 and ask you if, after examining that list, it appears to you that was the list which you typed up?

Mr. Berke: Just a moment. I object to all this. This was gone into with this witness previously. It is improper rebuttal.

Mr. Karasick: This is preliminary.

Trial Examiner: I believe she testified to that.

Mr. Karasick: I know, but this is preliminary to the next [3575] question I am about to get to.

Trial Examiner: What is the answer?

The Witness: Yes.

Q. (By Mr. Karasick): I now hand you Respondent's Exhibit 13 and ask you to look at that carefully and tell the Examiner whether or not you ever saw that list before?

A. No, I did not.

(Testimony of Ernestine Albini.)

Q. Would you turn it over? There is some typing on the back side too. Were you ever given that list by Mr. McGuire to copy?

A. No; I never saw it before.

Mr. Karasick: Your witness.

Cross Examination

* * * * *

Q. (By Mr. Berke): Where did you type this list from, General Counsel's 36?

A. From the payroll records.

Q. So that you didn't copy it then from Respondent's 13? A. No. [3576]

* * * * *

Mr. Berke: Since Mr. Karasick asked Mr. Martini the other day to ascertain whether the figures in the letter of February 17, 1955 from Mr. McGuire to Mr. Caldwell with respect to fresh apples and processed in can, as the figures were given in tonnage in that letter, were correct. I have ascertained and I have given the information to Mr. Karasick off the record that the figure of total tons of apples processed in 1954—that is, fresh apples processed—were 4,648.18 tons, and total of apples processed in 1954, in cans, were 8,465.25 tons.

* * * * *

GEORGE SILVA

a witness called by and on behalf of the General Counsel, National Labor Relations Board, having been previously duly sworn, was examined and testified as follows: [3596]

Direct Examination

* * * * *

Q. (By Mr. Karasick): Now, Warehouse No. 5 the record shows was converted into a canned goods, insulated warehouse in 1954. What were the dimensions of that building?

A. That packing shed was about 80 or 85 by 200 feet.

Q. Now, in addition to that, there was a—there is a cannery warehouse on the premises, is that right, and was in '54? A. Yes.

Q. What were the dimensions of the cannery warehouse?

A. The cannery warehouse was 100 by 100 feet.

Q. Did that include the cannery itself?

A. No, the cannery was separate.

Q. What were the dimensions?

A. The cannery itself was 50 by 100.

Q. Now, what was the capacity of the cannery warehouse for storing canned goods?

A. About 114,000 cases.

Q. How did you figure that?

A. Well, by the rows, approximately 36 rows in the warehouse; they held 11 pallets deep, three high, 96 cases a pallet.

(Testimony of George Silva.)

Q. Now, was all of the space in the cannery warehouse used for storage?

Mr. Berke: When?

Q. (By Mr. Karasick): In 1953 while you were there and in part of 1954 that you were there?

A. No, not all of the space.

Q. Why not? Explain the situation to the Examiner with respect to the storage space available in the cannery warehouse?

A. Part of the space was used for equipment for casing and labeling canned goods, and there was also——

Q. Where was that; where did that run, that equipment?

A. It was on the north end of the building, run the 50-foot length, about 20 foot from the wall. It was built underneath the mezzanine floor—there is a mezzanine floor that runs along the north end of the building. [3599]

Q. Now, the mezzanine took up how much space?

A. It took up the north wall with the exception of a 12-foot aisle about 20 foot wide by—it would make it almost 100 feet long.

Q. And how wide was the mezzanine?

A. It was about 20 feet. [3600]

* * * * *

Q. (By Mr. Karasick): Mr. Silva, what would be the capacity of a warehouse 100 by 100?

Trial Examiner: 20 feet high.

The Witness: Well, I would have to figure that out.

(Testimony of George Silva.)

Q. (By Mr. Karasick): Do you want a pencil?

A. An area 100 by 100 would take 42 rows.
About 139, 792 cases.

Mr. Berke: May I see how you arrive at that?

Q. (By Mr. Karasick): Would you explain for the record how you arrived at that figure?

Mr. Berke: I would like to look at that figure.

Q. (By Mr. Karasick): Explain for the record how you arrived at that figure?

A. In an area 100 by 100, in this particular case in this warehouse with a 12-foot corridor or aisle, would take 42 rows and each row takes 11 pallets long by three high by 96 cases per pallet.

Q. Okeh. That is the way you arrived at the figure?

A. (Nodding affirmatively.) I might be off.

Q. Was the Warehouse No. 5 20 feet high?

A. Yes. [3604]

Q. Is that the same height as the cannery warehouse?

A. Yes, the main floor itself was, yes.

Q. What about the cold storage? Were the rooms in there the same height?

A. Cold storage is the same, 20 foot, 100 by 100.

Q. Was there more than one room in the cold storage building?

A. Two rooms with 20-foot corridor.

Q. And how big were the rooms?

A. 100 by 100.

Q. Each? A. Each.

(Testimony of George Silva.)

Q. In 1953 did you make any changes in one of the cold storage rooms out there?

A. Yes. We installed a heater in order to use it for a canned goods warehouse.

Q. Now, who installed the heater out there?

A. I supervised the job. My mechanic done the actual work.

Q. And did you purchase the heater and supplies and materials for it?

A. Yes; it was my job.

Q. What was the total cost of that?

A. Well, labor and heater wouldn't run over a couple of hundred dollars.

Q. Now, how did you have this arranged? Was it a permanent installation, the heater had to stay there all of the time or [3605] what?

A. No, it was temporary. We had the heater hanging from the ceiling in the aisle so that it could be removed for cold storing apples.

Trial Examiner: Was that a gas heater?

The Witness: Gas heater, yes, sir.

Q. (By Mr. Karasick): What kind—what type, I mean? Blower type?

A. Blower type, yes.

Q. When was that heater installed, in 1953 or about when?

A. In December sometime; I don't recall the date.

Q. How long could apples be kept in cold storage for processing purposes?

A. I have kept them as long as three months on

(Testimony of George Silva.)

the Gravensteins; late apples could be—I held them a little longer.

Q. How much longer?

A. Oh, it was five, six months.

Q. Now, in 1951 do you know what the cannery warehouse facilities for canned goods were there at SAGU? A. The cannery warehouse?

Q. No. Do you know what facilities they had in 1951 for storing canned goods?

A. Yes, we had the cannery warehouse, also packing sheds which we used for storing case goods. We used——

Q. This is '51? [3606] A. Oh, '51?

Q. Yes.

A. '51, no, just the cannery warehouse is all they used; that was their first year.

Q. In '52 do you know what facilities they had and used for storing canned goods?

A. '52 we used the cannery warehouse, also the packing sheds at No. 1 and No. 2 in Sebastopol and No. 6 in SAGU.

Q. In 1953 what storage facilities were used?

A. '53 we used cannery warehouse, one room in the cold storage plant; we also stored case goods on the cold storage porch which was approximately 50 by 100 and also stored some case goods on the cannery porch in an area about 20 by 50, I would say.

Q. Well, what was the actual area of the cannery porch? A. It is 20 by 150.

(Testimony of George Silva.)

Q. What is the actual area of the cold storage porch?

A. That is 50 by 220, I believe it is.

Q. Now, can you tell us how many cases were stored on each of those porches during 1953; let's take the cold storage porch first.

A. Cold storage porch, I believe we had around 70,000 cases stored in there.

Q. And on the cannery porch how many?

A. About 6,000.

Q. Now, how long did these canned goods remain stored out on [3607] the porches, to your knowledge?

A. Well, when I left there in May of 1954 there was still a few cases stored on the cold storage porch.

Q. In your experience out there during the course of the season did the apples come at the same rate, slower or faster than the cannery would process them?

A. Faster.

Q. And in 1952 and '53 was that true?

A. Yes.

Q. Did you have any apples stored outside during that period?

A. Yes, we had quite a tonnage stored in common storage outside and under the porches of the cold storage and the cannery.

Q. Now, you say "Common storage". What does that mean?

A. Common storage is anything stored without refrigeration.

(Testimony of George Silva.)

Q. What was the length of the time that these apples remained out there?

A. Oh, I have had them out there one to five weeks.

Q. Did anything happen to them?

A. Nothing that I would notice to them; they were processing apples.

Q. Did any of them get sunburned?

A. Yes, we had quite a few in that yard storage.

Q. What happened to those?

A. All of the top apples got sunburned.

Q. What—

A. They were processed and the sunburned was trimmed out. [3608]

Q. Was there any great loss?

A. Not a great loss, no.

Mr. Berke: I want to move that be stricken—"great loss". It is indefinite and vague.

Trial Examiner: I think you better make it more certain.

Q. (By Mr. Karasick): Can you indicate to the Examiner what sort of loss, if any, there was, in some terms that are convenient for you to articulate here for the record?

A. Well, they were peeled and—on the peeling machine—and what the peeling machine did not take off, of the sunburn, the trimmers did with their trimming knives.

Trial Examiner: Can you give any proportion of the apple that might have been removed that way that would not otherwise have been removed?

(Testimony of George Silva.)

The Witness: About one-sixth of the apple, I would say.

Q. (By Mr. Karasick): And this would be only the apples that were at the top of the boxes, you say?

A. Yes, those that were actually on top of the boxes, on top of the stack. [3609]

* * * * *

Cross Examination * * * * *

The Witness: The whole plant was insulated.

Q. (By Mr. Berke): As I understand it, you say that you kept apples—Gravenstein apples—for three months in cold storage, as long as that; is that correct? A. Yes, I have.

Q. Now, in order to keep them that length of time, wouldn't the condition of the apple when it is brought in to cold storage determine the length of time it could be kept? A. Yes. [3614]

Q. And you said you kept late apples for as long as five or six months. Now, isn't that equally true, that the condition of the apple would determine the length of time that you could keep it?

A. That is true.

Q. You were not at SAGU after May of 1954, were you? A. No, I was not employed there.

Q. Not employed after that time. And so then of course you did not see the condition of the apples out there during the season of 1954?

A. No, I did not see their apples in '54. [3615]

* * * * *

(Testimony of George Silva.)

Q. (By Mr. Berke): I say, since May of 1954 you have not been there; is that correct?

A. Not employed.

Q. That is right?

A. As an employee, no.

Q. So that you don't know what use they made throughout the 1954 season then of their cold storage facilities, do you, of your own personal knowledge?

A. No, I don't know how to take that. I know that the No. 5 shed was converted into a warehouse.

Q. Well, yes. That you have already testified to.

A. What they stored in there I don't actually know, no.

Q. You don't know what they stored in the other storage facilities that they had throughout the '54 season, of your own personal knowledge?

A. No, I wouldn't, not after May. [3623]

* * * * *

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you say?

A. Yes, the
boxes, on top

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Cross

The Witness:

Q. (By Mr. Bee
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Q. Now, in orde to k
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of time it could be kept?

Q. And you said you kept
long as five or six months. Now,
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mine the length of time that you co

A. That is true.

Q. You were no at SAGU after M
were you? A. No, I was not employ

Q. Not employe after that time. And
of course you did not see the condition
apples out there duing the season of 1954?

A. No, I did no see their apples in '54

* * * * *

GENERAL COUNSEL'S EXHIBIT No. 19

United States of America

Before the National Labor Relations Board

Case No. 20-RC-2637

In the Matter of SEBASTOPOL APPLE GROWERS UNION, Employer, and GENERAL TRUCK DRIVERS, WAREHOUSEMEN AND HELPERS UNION, LOCAL No. 980, I.B.T.C.W. & H. OF AMERICA, A.F.L., Petitioner.

REPORT ON CHALLENGED BALLOTS

Pursuant to a Direction of Election of the National Labor Relations Board, hereinafter called the Board, an election by secret ballot was conducted on October 19, 1954, among certain employees of the Sebastopol Apple Growers Union. An official Tally of Ballots was served by registered mail upon each of the parties on October 20, 1954, in which the following results were shown:

Void ballots	0
Votes cast for Petitioner.....	27
Votes cast against participating labor organization	73
Valid votes counted.....	100
Challenged ballots	111
Valid votes counted plus challenged ballots....	211

No objections were filed to the election. The challenged ballots are sufficient in number to affect the results of the election.

Pursuant to Section 102.61 of the Board's Rules

General Counsel's Exhibit No. 19—(Continued)
and Regulations, Series 6, as amended, the undersigned has investigated the challenged ballots and hereby reports as follows:

On October 4, 1954 the Board directed an election amongst the employees in the unit found by the Board to be appropriate who were employed during the payroll period immediately preceding the Direction of Election, including employees who did not work during said payroll period because they were ill or on vacation or temporarily laid off, and employees in the military service of the United States who appear in person at the polls, but excluding those employees who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election. On the payroll of the period thus determined which ended on October 2, 1954, there were approximately 239 employees. On October 15, 1954, the Employer changed its operation from a two-shift to a single-shift basis. The eligibility list furnished by the Employer for use in the election conducted on October 19, 1954 listed 122 persons within the appropriate unit, employed prior to October 2, 1954, and still employed on October 19, 1954. Ballots were cast by 111 of these persons, six of which were challenged by the Petitioner and five by the Agent of the Board conducting the election.

In addition, 100 ballots were cast by voters whose names did not appear on the eligibility list, all of which were challenged by the Employer.

* * * * *

GENERAL COUNSEL'S EXHIBIT No. 25

[Letterhead of Sebastopol Apple Growers' Union]

October 14, 1954

To All Employees:

At a meeting of our Board of Directors last Tuesday night, October 12, 1954, I was directed to reduce our production staff to one shift. This decision was made for the reason that a survey shows that we have less than 250 tons of apples left to harvest and that many of these will be sold as fresh apples.

Our cannery shipments at the moment are far less than our production and since our warehouses are filled to capacity, we have no alternative in our decision.

In fairness to all of our employees, we have kept on our payroll those of you that had the earliest employment date.

This letter may be used as our certification that we have no further employment for you and that you are now unemployed through no fault of your own. Your checks will be in the mail to you this Saturday night.

On behalf of our management we wish to thank you for your loyal service.

Very truly yours,

Sebastopol Apple Growers' Union,
Elmo Martini,
General Manager.

GENERAL COUNSEL'S EXHIBIT No. 26

APPLICATION FOR EMPLOYMENT

Date

19

Full Name (LAST) (FIRST) (MIDDLE) Social Security No.

Address (NO.) (STREET) (CITY) (ZONE) (STATE) Telephone Number

How long have you been a resident of the city in which you reside?

Sex: (MALE - FEMALE) 5. If female and married give maiden name:

Date of birth: (MO. - DAY - YR.) 7. Age: 8. Height: 9. Weight:

Color of hair: 11. Color of eyes: 12. U. S. Military Service:

Check whether: married ☐ single ☐ widow(er) ☐ divorced ☐

Number of dependents: Children: Parents: Others:

For what position are you applying? Salary expected: \$

What prompted your application: (check) Employment Agency: ☐ Own Accord: ☐

Employee Referral: ☐ Name of Employee: Advertisement: ☐ Other: ☐

Do you: Own Home: Rent Home: Board: Live with Parents:

Have you ever been an employee of this Company under another name? Yes No

If "yes" give name and period of employment: From: To:

Have you ever been involved in criminal proceedings under another name? (NAME) Yes No

If "yes" state nature and disposition of case:

Have you ever been arrested (other than traffic offenses)? Yes No

If "yes" give: Date: Place: Charge: Disposition: 26

Have you any physical defects or chronic ailments? Yes: No:

If "yes" give details:

Have you ever had an industrial accident? Yes: No: If "yes" give details:

Are you a citizen of the United States? Yes: No:

a. If "no" do you intend to become a citizen of the United States? Yes: No:

b. Have you filed your first papers? Yes: No:

c. Have you the right to remain permanently in the United States? Yes: No:

d. Have you ever been interned or arrested as an enemy alien? Yes: No:

Do you have any relatives already employed by this Company? Yes: No:

If "yes" give name and relationship: Name: Relationship:

To what Trade, Professional or other organizations are you a member?

(DO NOT NAME ANY ORGANIZATION WHICH WOULD REVEAL YOUR RACE, RELIGION, COLOR OR ANCESTRAL ORIGIN.)

OFFICIAL EXHIBIT No. 26

Identified
Received
Disposition

26

26

26

26

26

26

26

26

26

26



General Counsel's Exhibit No. 26—(Continued)

26. Give name of your father, mother, wife (husband), and children:

NAME	ADDRESS (within U. S.)	RELATIONSHIP	DECEASED OR LIVING

27. EDUCATION

SCHOOL	YEARS ATTENDED	DATE LEFT	GRADUATED		NAME OF SCHOOL	MAJOR COURSE TAKEN	DEGREE
			YES	NO			
Grammar							
High School							
College							
Graduate Work							
Trade or Bus.							
Correspondence							

What foreign languages do you read, write or speak fluently?

28. EMPLOYMENT HISTORY

Give last three (3) Employers.

1. Name of last Employer:	Address:				Name of Boss:
From:	To:	Position:	Salary:		Reason for leaving:
2. Name of next previous Employer:	Address:				Name of Boss:
From:	To:	Position:	Salary:		Reason for leaving:
3. Name of next previous Employer:	Address:				Name of Boss:
From:	To:	Position:	Salary:		Reason for leaving:

29. REFERENCES
(Exclude Relatives or Former Employers)

NAME	ADDRESS	BUSINESS OR OCCUPATION

PLEASE READ CAREFULLY

In the event of my employment by the Company, I agree to abide by all present and subsequently issued rules of the Company.

I authorize all previous employers to furnish to _____ my record, reason for leaving, and all information they may have concerning me, and I hereby release them and _____ from all liability for any damage whatsoever arising therefrom. I also authorize investigation of all statements in this application.

I understand that, in the event of my employment by the Company, I shall be subject to dismissal if any of the information have given in this application is false or if I have failed to give any material information herein requested.

Applicant's signature _____



GENERAL COUNSEL'S EXHIBIT No. 28

Authorization for Representation Under the National Labor Relations Act
I, the undersigned, employee of



SEBASTOPOL APPLE GROWERS UNION CANNERY
COMPANY

SEBASTOPOL, CALIF.
ADDRESS

A. F. of L.

authorize General Truck Drivers and Helpers Union, Local No. 980, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, A. F. of L., to represent me in negotiations for better wages and working conditions.

This authorization supersedes any similar authority previously given to any person or organization.

My Signature **ORICE STOREY**

My Address **169 BURNETT AVE.**

Social Security No. **54548 8414** Date of Birth **JAN. 7, 1913**

Date **AUG. 4, 1954** Phone **SEB. 2403** Book No. _____

GENERAL COUNSEL'S EXHIBIT No. 30

ERNEST VIEIRA, M. D.

**203 BODEGA AVENUE
SEBASTOPOL, CALIFORNIA**

0 8734

DATE **Oct 27 1954**

Mrs Orice Storey

Lived on Account **Two @ 50% 70%** \$ **2 50/100**

On full for off call, Sept 25, 1954

AMOUNT DUE \$ _____

BALANCE DUE \$ _____

ERNEST VIEIRA, M. D.

BY **E. Vieira M.D.**

C



GENERAL COUNSEL'S EXHIBIT No. 32

[Handwritten note appearing on each page—"2-4-55. I received this list from Erma Bates. It was shown to Mr. Duckworth, Mrs. McGuire, Inez Brock, and one occasion it was on the table in the lab at the plant. (Signed) Ella Herrerias".]

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Ann Hance, 678 Petaluma Ave., Sebastopol, California.

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1210 *National Labor Relations Board vs.*

General Counsel's Exhibit No. 32—(Continued)

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General Counsel's Exhibit No. 32—(Continued)

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1214 *National Labor Relations Board vs.*

General Counsel's Exhibit No. 32—(Continued)

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General Counsel's Exhibit No. 32—(Continued)

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General Counsel's Exhibit No. 32—(Continued)

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Sadie A. Welch, 1295 Lloyd Ave., Santa Rosa, California. Ph. 7413 J.

Cora Whitt, 1801 Cooper Rd., Sebastopol, California. Ph. 2761.

Marcia D. Young, 735 Davis St., Santa Rosa, California. Ph. 8605.

Sebastopol Apple Growers Union 9/29/54 List

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General Counsel's Exhibit No. 32—(Continued)

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Maria Wiedenmeyer, 980 Burbank Ave., Santa Rosa, California.

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General Counsel's Exhibit No. 32—(Continued)

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General Counsel's Exhibit No. 32—(Continued)

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Ruth Lee Deal, 215 Boyce St., Santa Rosa, California. Ph. 3945 J.

Ruth Elizabeth Clark, 211 Olive St., Santa Rosa, California. Ph. 8599 W.

Harriet E. Cameron, 5465 Bohemian Hiway, Sebastopol, California.

Darlene Bennett, 100 Mark West Springs Rd., Santa Rosa, California. Ph. 8132.

Evelyn Cuttress, 362 East Oak Ave., Santa Rosa, California.

Karen Bomberger, 317 Yates Dr., Santa Rosa, California. Ph. 4915 J.

Anna Vogel, Box 56, Graton, California.

Vernie L. Short, 215 Boyce St., Santa Rosa, California.

GENERAL COUNSEL'S EXHIBIT No. 36

List of employees' names read by Mr. W. H. McGuire, October 15, 1954, who were to be retained for work.

Women

1, Albin, Dora; 2, Augustin, Elizabeth; 3, Bartlett, Marie; 4, Brennen, Ruth; 5, Brock, Inez; 6, Butler, Dolores; 7, Cassidy, Beulah; 8, Chapson, Louise; 9, Connors, Francis; 10, Elmore, Hazel.

11, Elvy, Cora; 12, Fishelson, Ida; 13, Thorp, Ilah; 14, Drake, Francis; 15, Herrerias, Ella; 16, Smoker, Helen; 17, Chicano, Virginia; 18, Freyling, Dolores; 19, Gullledge, Daisy; 10, Kounouvsky, Evelyn.

21, Wakeland, Geneva; 22, Hack, Ernestine; 23, Pesenti, Claudia; 24, McGuire, Mary; 25, Susoff, Ruth; 26, Armbrust, Joyce; 27, Veach, Shirley; 28, Rettela, Gertrude; 29, Frank, Charlotte; 30, Mahoney, Goldie.

31, Allen, Lois; 32, Loeffler, Sandra; 33, Ameral, Isabella; 34, Allman, Mildred; 35, Bertoli, Gere-line; 36, Bills, Julia; 37, Bertozzi, Eleanor; 38, Gust, Josephine; 39, Johnson, Melba; 40, Jacobus, Vita.

41, Bonar, Julia; 42, Brown, Gladys; 43, Cam-
erson, Harriet; 44, Castino, Mary; 45, Chames, Jo-
anne; 46, Carrera, Ensebia; 47, Chapman, Alta;
48, Deal, Ruth; 49, Cuttress, Evelyn; 50, Cuttress,
Valeria.

51, Davello, Clara; 52, Dickerson, Elsie; 53, Gale,
Maude; 54, Dewitt, Betty; 55, Gesek, Dorothy; 56,

General Counsel's Exhibit No. 36—(Continued)

Harris, Mary; 57, Jones, Gertrude; 58, McAfee, Bernice; 59, McDermott, Vita; 60, Mizell, Barbara.

61, Nemet, Elizabeth; 62, Niemi, Selma; 63, Noble, Mary; 64, Pate, Gloria; 65, Ploxa, Pauline; 66, Poncia, Anita; 67, Rawles, Dora; 68, Reece, Gertrude; 69, Reynolds, Rosette; 70, Caddel, Mary.

71, Schoenthal, Elizabeth; 72, Doty, Esther; 73, Howes, Georgia; 74, Elmore, Gene; 75, Jones, Connie; 76, Zimpher, Patricia; 77, Ziegenbein, Thelma; 78, Monroe, Betty; 79, Johnson, Willie.

Men

1, Poggi, Joseph Jr.; 2, Coppock, Irvin; 3, Garcia, Joe; 4, Jungers, Oscar; 5, Masuoka, Frank; 6, Oandason, Andy; 7, Papera, Oliver; 8, Struempf, Steve; 9, Tallman, Lester; 10, Tsurumoto, Georgia.

11, Elmore, Jean; 12, Loeffler, Carl; 13, Chicano, Salvador; 14, Foster, Herman; 15, Yeager, Kenneth; 16, Snodgrass, Bob; 17, Johnson, Raymond; 18, Crownover, Lee; 19, Hall, Sid; 20, Correria, Frank; 21, Gulledge, Lonzo; 22, Chapman, Orland; 23, Lewis, Victor; 24, Gulledge, Martin; 25, Jiminez, John; 26, Anderson, William; 27, Smith, Wayne; 28, Bennett, Lawrie; 29, Rodriquez, Ed; 30, Higgins, Edward (Jim).

31, Lee, Robert; 32, Todd, Gerald; 33, Penelli, Ray; 34, Falorni, Adolfo; 35, Festa, Enrico; 36, Wood, Robert; 37, Donner, George.

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GENERAL COUNSEL'S EXHIBIT No. 37

Women production employees as of October 14, 1954:

Name	Date Hired	Shift
✓ Albertoni, Ruth	8- 9-54	N
Albini, Dora	7-15-54	D
Allen, Lois	9-13-54	N
Allen, Marceline	9-28-54	D
✓ Allman, Mildred	9- 2-54	N
Ameral, Isabele	7-16-54	D
Ameral, Lina	7- 9-54	D
Ames, Nora	8- 2-54	D
Anderson, Caroline	9-13-54	D
✓ Angle, Marvel	10- 5-54	D
✓ Antone, Bertha	10- 7-54	N
Antone, Eva	9-13-54	D
Armbrust, Joyce	7-20-54	N
Augustin, Elizabeth	7-16-54	N
Awender, Karolina	7-15-54	D
Azevedo, Virginia	10-11-54	D
✓ Baker, Bonnie	9-23-54	N
Bartlett, Marie	7-15-54	N
✓ Bartozzi, Eleanor	7-20-54	N
Bate, Erma	7-19-54	N
Bertoli, Gereline	8-24-54	N
Bills, Julia	7-21-54	D
Blair, Ethel	7-22-54	N
Bonar, Julia	7-20-54	N
Brennan, Ruth	7-20-54	N
✓ Brickner, Bessie	7-20-54	N
Bridges, Leona	8- 5-54	D
Bridges, Oma	7-28-54	D

General Counsel's Exhibit No. 37—(Continued)

	Name	Date Hired	Shift
	Brines, Zelma	7-17-54	D
	Brock, Inez	7-20-54	N
✓	Brott, Virginia	10- 8-54	N
	Brown, Gladys	7-19-54	D
	Browning, Billie	7-20-54	N
	Browning, Doris	7-20-54	N
✓	Buhrman, Nina	8- 2-54	D
	Butler, Dolores	7-20-54	N
	Byrd, Margie	7-16-54	D
	Caddel, Mary	9-13-54	N
	Cameron, Harriet	7-31-54	D
	Carrera, Eusebia	9-13-54	N
	Cassidy, Beulah	7-20-54	N
	Castino, Mary	7-28-54	D
	Chames, Joanne	7-26-54	D
✓	Chapman, Alta	8-25-54	D
	Chapson, Louise	7-20-54	N
	Chicano, Virginia	7-15-54	N
	Cihos, Mary	9- 8-54	D
	Clark, Ruth	7-17-54	D
	Coate, Natalie	9-10-54	D
✓	Coats, Susie	9-28-54	D
	Coffey, Marie	7-20-54	D
	Collins, Marie	9-28-54	D
	Connors, Frances	7-20-54	D
✓	Cooley, Elizabeth	10-11-54	N
	Crump, Gatha	10-14-54	D
✓	Cuttress, Evelyn	7-20-54	D
	Cuttress, Valeria	7-20-54	D

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General Counsel's Exhibit No. 37—(Continued)

Name	Date Hired	Shift
Dahl, Evelyn	9-29-54	D
Davello, Clara	8-27-54	N
✓ Davis, June	9-10-54	N
Deal, Ruthie	8- 9-54	D
DeWitt, Betty	9-27-54	N
Dickerson, Elsie	7-19-54	D
Doty, Esther	7- 6-54	D
Drake, Frances	7-26-54	N
Edwards, Helene	7-22-54	N
Eilers, Myrtis	9- 7-54	D
Ellis, Mary	9- 6-54	D
✓ Elmore, Jean	6- 7-54	D
Elmore, Hazel	9-29-54	D
Elvy, Cora	7-20-54	N
Fenton, Violet	8-30-54	D
Fishelson, Ida	7-20-54	N
✓ Fletcher, Esther	7-20-54	N
Floyd, Elsie	9-18-54	D
Frank, Charlotte	7-22-54	N
Freyling, Delores	7-20-54	N
Freyling, Marcia	7-22-54	N
✓ Gaither, Lula	7-20-54	N
Gale, Maude	7-20-54	N
Garrison, Fannie	7-15-54	D
✓ Geist, Josephine	10- 8-54	N
Geseck, Dorothy	8-31-54	N
Gulledge, Daisy	7-15-54	N
Hack, Ernestine	7-19-54	N
Hall, Pastoria	7-26-54	D
✓ Hance, Anna	7-22-54	D

General Counsel's Exhibit No. 37—(Continued)

Name	Date Hired	Shift
Hansen, Hazel	9-18-54	D
✓ Hanson, Ruth	8-18-54	N
Harris, Mary	8-19-54	N
Harrison, Lucille	9-29-54	D
Hayden, Rose	9- 7-54	D
Herrall, Gail	10-13-54	D
Hoffschneider, Elsie	9- 7-54	N
Hofland, Theresa	9-13-54	N
✓ Hontar, Ellen	8- 5-54	N
✓ Hontar, Kathleen	8- 5-54	N
Hope, Laura	10- 6-54	D
Hydera, Marie	8- 4-54	D
Jacobus, Vita	10-12-54	N
✓ Johnsen, Irene	8-25-54	N
Johnson, Leonor	7-23-54	D
Johnson, Melba	10- 9-54	N
Jones, Connie	10- 4-54	N
Jones, Gertrude	7-17-54	D
✓ King, Dolores	9-14-54	N
Kounovsky, Evelyn	7-15-54	N
Kruse, Viola	8- 7-54	D
Layman, Lila	8- 6-54	D
Lee, Eva	7-20-54	D
Lindley, Beulah	8-10-54	D
✓ Lindsay, Gloria	7-21-54	D
✓ Loeffler, Sandra	7-28-54	D
McAfee, Bernice	7-15-54	N
✓ McCarl, Edna	9- 6-54	D
McCarthy, Dora	9-29-54	D
McCullough, Alice	9-28-54	D

General Counsel's Exhibit No. 37—(Continued)

Name	Date Hired	Shift
McDermott, Vita	9-13-54	N
McHugh, Elizabeth	9-28-54	D
McGuire, Mary E.	7-19-54	N
McPhee, Eloyce	7-16-54	D
Mahoney, Goldie	7-22-54	N
Marguez, Mary	9-11-54	D
Maw, Goldie	9-28-54	D
May, Mary	8- 6-54	D
Mazzuechi, Nancy	9-14-54	N
Miller, Hazel	7-20-54	D
✓ Mizell, Barbara	8-31-54	D
✓ Monroe, Betty	10-12-54	N
✓ Morien, Norma	10- 7-54	N
Mynock, Ada	8-21-54	D
Napier, Renee	10- 1-54	N
Nelson, Irene	8-18-54	D
✓ Nemet, Elizabeth	7-16-54	D
Niemi, Selma	8-31-54	N
Noble, Mary	7-20-54	N
✓ Nunes, Bernice	7-31-54	N
Offut, Dorothy	7-16-54	D
Pate, Gloria	7-15-54	D
✓ Patterson, Marian	8- 4-54	D
Perry, Catherine	8- 2-54	N
Pesenti, Claudina	7-20-54	N
Peterson, Sylvia	7-19-54	N
Pirolle, Esther	7-21-54	N
✓ Ploxa, Pauline	9-13-54	N
Poncia, Anita	7-20-54	N
Pool, Lorraine	9-22-54	D

General Counsel's Exhibit No. 37—(Continued)

Name	Date Hired	Shift
Rawles, Dora	9-13-54	N
Rearden, Darlene	10-12-54	D
Reece, Gertrude	9-15-54	D
Rettela, Gertrude	7-22-54	N
Reynolds, Rosette	7-24-54	D
Roca, Pauline	9-28-54	D
Ross, Aloa	10- 2-54	D
✓ Row, Julia	7-22-54	
✓ Rufino, Margaret	7-20-54	N
✓ Runyon, Lillian	9- 3-54	N
Russell, Mary	7-24-54	D
Scheffler, Marie	7-16-54	D
Schoenthal, Elizabeth	7-17-54	D
✓ Schrum, Evelyn	8-23-54	N
Scott, Gertrude	8-24-54	D
✓ Scott, Merle	7-22-54	N
✓ Seidel, Mary	9-13-54	N
Shields, Viteria A.	7-16-54	D
✓ Smith, Jessie (Mrs.)	7-17-54	N
(Quit end of shift 10/15)		
Smoker, Helen	7-20-54	N
Souza, Mathilda	9-27-54	N
Susoeff, Ruth	7-19-54	N
Sweningson, Amy	10-4-54	D
Taber, Marion	9- 1-54	N
Tatum, Nancy	10-12-54	D
Thornton, Louis	10- 5-54	D
Thorp, Ilah	7-20-54	N
Tripp, Marie	9-10-54	D
Urton, Etta	7-20-54	D

General Counsel's Exhibit No. 37—(Continued)

	Name	Date Hired	Shift
	Veach, Shirley	7-21-54	D
	Vernon, Amy	9-13-54	D
✓	Vessels, Stella	9-17-54	D
	Vogel, Anna	7-15-54	D
	Wakeland, Geneva	7-20-54	N
✓	Wasin, Edyth	8- 5-54	D
	Wilder, Louise	9-14-54	D
	Wilson, Edith	7-27-54	N
	Ziegenbein, Thelma	7-21-54	N
	Zimpher, Patricia	10- 6-54	N

GENERAL COUNSEL'S EXHIBIT No. 38

Men production employees as of October 14, 1954:

	Name	Date Hired	Shift
✓	Allman, Lyman	9- 1-54	N
	Anderson, William	9- 9-54	N
	Augustin, Willy	7-23-54	N
✓	Bate, John	9-14-54	N
	Bennett, Laurie	7-14-54	N
	Bertoni, Joe	9-28-54	N
✓	Breuer, Richard	9-28-54	N
✓	Browning, Doria*	7-20-54	N
	(*Crossed out in ink.)		
	Burger, George	9-21-54	D
	Chapman, Orland	7- 1-53	D
	Chicano, Salvador	7-19-54	N
	Coffey, John	7-19-54	D
	Coppock, Irvin	6-21-54	N
	Correia, Frank	7- 1-53	N

General Counsel's Exhibit No. 38—(Continued)

Name	Date Hired	Shift
Crownover, Lee	8-30-54	D
Darden, David	7-29-54	N
Davis, George	9-27-54	D
DeVilbiss, Robert	7-19-54	D
Donner, George	7-20-54	N
Duncan, Worthy	9-24-54	D
Elmore, Eugene	7-17-54	D
Falorni, Adolfo	8-16-54	D
Festa, Enrico	8-16-54	D
Foster, Herman	7-20-54	D
Foster, William	9-23-54	N
Fribourghouse, Ernest	7-13-54	N
Garcia, Jose	3-29-54	D
Gulledge, Alvin*	7-20-54	
(*Crossed out in ink.)		
Gulledge, Lonzo	5- 1-53	D
Gulledge, Martin	7-20-54	D
Hall, Sidney	8-31-54	D
Heflin, Arthur	10- 4-54	D
Higgins, Edward	9- 1-53	D
Jiminez, John	2-18-54	D
Johnson, Raymond	7-24-54	D
✓ Johnson, Willie	9-13-54	N
Jungers, Oscar	7-20-54	D
Kelleher, Gerald	8-27-54	N
Lee, Leonard	7-23-54	D
Lee, Robert	6-28-54	D
Lewis, Victor	9- 4-53	D
Loeffler, Carl	7-15-54	D
McCall, Harry	9-29-54	N

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General Counsel's Exhibit No. 38—(Continued)

Name	Date Hired	Shift
Marra, Alvin	7-21-54	N
Masuoka, Frank	7- 8-54	D
Mills, Lloyd	10-11-54	D
Narron, Henry	7-8-54	N
Neel, Fay	6- 7-54	N
Orandason, Andy	5-24-54	N
Panelli, Ray	7-13-53	D
Papera, Oliver	4-19-54	D
Phillips, Richard	9-24-54	D
Poggi, Joseph Jr.	4-19-54	N
Pozzi, Charles	9-27-54	N
Rahm, Albert	6-21-54	N
Reynolds, Richard	8-11-54	N
Rodrigues, Edward	7-14-54	D
Rogers, Gerald	9-29-54	N
Smith, Jessie*	7-17-54	N
(*Crossed out in ink.)		
Smith, Joyce W.	7-17-54	N
Smith, Wayne	8- 7-54	D
Snodgress, Robert	5-10-54	D
Storey, Clarence	7-15-54	D
Sweningson, Rudolph	10- 4-54	D
Tallman, Lester	1952	D
Todd, Gerald	8-21-54	D
Tsurumoto, George	7-15-53	N
Unciano, Froilan	8-24-54	D
Weare, William	7-20-54	D
Wood, Robert	7-20-54	N
Yeager, Kenneth A.	9- 2-54	D

GENERAL COUNSEL'S EXHIBIT No. 39

I, Leonard J. Duckworth, 478 Elphick Road, Sebastopol, California, Telephone No. Sebastopol 4381, being duly sworn, depose and state as follows:

I first began to work for Sebastopol Apple Growers Union on or about July 1, 1952, as a chemist and a cannery foreman, and remained in that position until July 1954, with the exception of a period of six months, from September 1953 to April 1954, when I left and went to work as a technician at Santa Rosa Memorial Hospital in Santa Rosa. I have been cannery superintendent at Sebastopol Apple Growers Union since the latter part of July 1954. Mr. McGuire's following statement of the supervisors of Sebastopol Apple Growers Union is correct:

Elmo Martini, General Manager.

William McGuire, Sales Manager.

Errol Wilson, Accountant and Traffic.

Louis Turnage, Manager of Packinghouse.

Leonard Duckworth, Superintendent of Cannery.

Charles Williams, Cannery Foreman.

Ella Herrerias, Cannery Floorlady (night shift).

Edna Hardin, Cannery Floorlady (day shift).

John Aguire, Warehouse Foreman.

Danny Shuster, Assistant Warehouse Foreman.

I do not know whether Steve Stumpf should be regarded as a supervisor, but a description of his duties is as follows: Stumpf is chief mechanic and works together with Joe Poggi, Oliver Paperra, Raymond Johnson, and Sid Hall, mechanics' helpers, and Bod Snodgrass, mechanic. Stumpf receives

General Counsel's Exhibit No. 39—(Continued)
an hourly wage of \$1.90 while the other persons named receive either \$1.40 or \$1.50, with the exception of Snodgrass who gets \$1.85. Stumpf instructs the other members on the mechanics' crew I have just named what work they should do and when they should do it. He corrects the work of the other members of the mechanics' crew whenever that is necessary. When any of the members of the mechanics' crew wish to go home early they get permission to do so from Stumpf who also tells them who should work overtime when that is necessary. Stumpf does not have the authority to hire or discharge anyone. He can, however, recommend to me either the hiring or discharging of a mechanic and his recommendation would be given more weight than those of the other members of the crew. The cannery packs its produce in the following size cans: No. 2 (20 oz.); No. 303 (1 lb. 1 oz.); No. 10 (6 lbs. 11 ozs.). Approximately 56 cans constitute one ton. (This would consist of 2 doz. cans per case of No. 303 which is the most common size, and would result in a case weight of approximately 25 lbs.)

The cannery operated this last season until either December 11 or December 18, 1954. At that time all the seasonal employees were let go, and only the permanent year-around staff maintained. The permanent staff consists of all of the supervisors except the two cannery floorladies, plus Stumpf and the four mechanics of the mechanics' crew, and also includes George Tsurumoto, a seamer operator

General Counsel's Exhibit No. 39—(Continued)
during the canning season and a general helper after the season is over; Orlin Chapman, labeling machine operator; Victor Lewis, canning machine operator; William Anderson, general helper; Lloyd Mills, general warehouse helper; and Less Talman, general carpenter. With the exception of Mills who came during the middle of the 1954 season, the permanent staff consists of the same persons who were kept the year round after the 1953 season ended. I choose all of the mechanics' crew and Aguire the rest of the men.

The 1954 canning season began about the middle of July. Early in July I ran experiments on slicing Gravenstein apples which proved to be successful, and before the season began in mid-July we received an order from Comstock, one of our big customers, for 70,000 cases of No. 2 cans of Gravenstein slices. This slice order made it necessary for us to arrange with one of the near-by canneries to put up apple sauce for us. The apples were delivered by our truck and some of the growers' trucks to the Co-op Cannery. General Manager, Martini, made the decision as to sending the apples to the Co-op Cannery for processing.

The decision to discharge Elsie Dickerson was made by me on the afternoon the discharge took place. During that morning Floorlady Ella Herrierias brought me an apple which had been plugged. By that I mean that after the apple core had been removed a hole had been cut in the side of the apple, and an apple core placed in this hole. I

General Counsel's Exhibit No. 39—(Continued)

asked Floorlady Herrerias who had done it and she told me that Dickerson had. I asked Herrerias if she had seen Dickerson plug the apple and Herrerias replied that she had not but that the girls in the trimming line had seen Dickerson do it. Herrerias also told me that she had questioned Dickerson about the matter, and Dickerson had admitted that she had done it. In addition Herrerias told me that Dickerson had done this before, and recommended that Dickerson be discharged. I had not known that Dickerson had plugged an apple before. I told Herrerias to give Dickerson another chance. About an hour later that same morning Herrerias brought another apple which had been plugged and said Dickerson had done it again. I did not ask her if she had seen Dickerson do it on this occasion, but told her to discharge Dickerson at the end of the shift. Herrerias discharged Dickerson that afternoon at the end of the shift, when her time card shows it was punched out.

Clarence Storey was employed as an apple dumper and worked with another man who stacked the empty boxes after they were dumped, and a third man who stacked boxes which held the material for making apple juice. On October 15, 1954, of six men, three were retained. I do not recall at the moment who the dumpers and stackers were that were let go on October 15 nor who were retained, but I will obtain their names, the jobs they did, and on which shifts they worked, and supply them together with a list of the names of any per-

General Counsel's Exhibit No. 39—(Continued)

sons who were not working as dumpers or stackers on October 15, 1954, and who were put on the payroll on such jobs after that date.

Mrs. Storey was working as a peeler, and half an hour before her shift was over at about 11:24 A.M. she punched out. Mrs. Chicano came to me while I was in the laboratory at about 11:30 A.M. Mrs. Chicano said to me, "Orice Storey keeps wanting me to join the Union and I don't want any part of it." I replied, "I'll take care of it". I then went out into the cannery and found the floorlady and asked her why Orice Storey was not working. The floorlady said Mrs. Storey had punched out without permission. Just then General Manager Martini came in and I told him that Mrs. Chicano had complained about being asked to join the union by Mrs. Storey and didn't want to join, and that Mrs. Storey had left her post without permission. At Mr. Martini's suggestion I went downstairs to see what Mrs. Storey was doing. When I returned to my office Mr. Martini said that she was to be discharged and to ask her to leave the building. Mrs. Storey was discharged for leaving her post without permission, for checking out before the end of the shift, and for annoying other workers.

The Gravenstein season the past year lasted about eight weeks, which is about the average time for that season. On October 12, 1954, the Board of Directors of the SAGU decided to reduce operations to one shift. A week or so before that, Chairman of the Board of Directors, Tony Bondi, had been

General Counsel's Exhibit No. 39—(Continued)
inquiring about the capacity of the warehouse which was just about filled. When the cannery is operating it needs about 30 tons of apples for each eight hour shift, whether slices or sauce are produced.

On October 13, 1954, Mr. McGuire informed me of the decision that had been reached by the Board of Directors and told me to pick out one good crew. Thereafter I met with Charlie Williams the night shift foreman, and Floorlady Herrerias, and the three of us made up a list together. We went through the names of employees on both the day and night shifts, and chose one shift from them. The choices were made in part on merit, and consideration was given to length of service. Mrs. Herrerias wrote down the names. Only the three of us were present, and the meeting lasted about an hour.

On October 15, 1954, Mr. McGuire told me there would be a meeting of the employees of both shifts in the warehouse at 3:30 that afternoon, and about 3 o'clock I put a sign on the blackboard near the time clocks informing the employees of such meeting. I also told the supervisors to tell their people to be there. All of the supervisors were present as well as Tony Bondi. Bondi spoke first, thanking the employees for their services. After Bondi spoke, Martini then read a letter to them telling them that they were being let go, and when he had finished he asked Mr. McGuire to read a list of the employees who were to be kept on the payroll. The meeting lasted about twenty minutes.

General Counsel's Exhibit No. 39—(Continued)

After it was over I went into the cannery and I saw a number of the employees walking out. I asked Mrs. Herrerias what they were doing, and she said they did not want to finish work. I did not talk to any of the employees myself. About twenty of the employees on the night shift did not go to work that night, but the rest of the employees did and the night shift operated. The employees who did not work, as is customary turned in their aprons and caps to Floorlady Herrerias, who gave each of them a receipt. Those employees who were re-employed after October 15, 1954, to fill vacancies were chosen on decision made by Floorlady Herrerias and myself together.

I have carefully read the foregoing statement consisting of this and four (4) other pages, which was voluntarily given to an Agent of the National Labor Relations Board in the presence of W. M. Caldwell, President of the California Association of Employers, and I do swear that the matters set forth above are true and correct to the best of my knowledge and belief.

/s/ Leonard J. Duckworth.

Subscribed and sworn to before me this 18th day of March, 1955.

/s/ David Karasick,
Attorney, NLRB.

GENERAL COUNSEL'S EXHIBIT No. 40A-B

[Letterhead of
California Association of Employers]

October 29, 1954

Mr. L. D. Mathews, Jr.
Field Examiner
National Labor Relations Board
630 Sansome Street
San Francisco 11, California

Re: Sebastopol Apple Growers Union
Case No. 20-RC-2637

Dear Mr. Mathews:

I refer to your letter dated October 20th, 1954, re the challenged ballots resulting from the N.L.R.B. election conducted in connection with the above numbered case.

You inclosed a copy of the names of the persons whose ballots were challenged, whom they were challenged by and the reason for the challenge.

I enclose herewith:

1) A list of names of all the employees, in the unit found appropriate, appearing on the payroll of the Sebastopol Apple Growers Union during the payroll period immediately preceding the date of the Direction of Election of the N.L.R.B., which was dated October 4, 1954.

There were no employees, to our knowledge, who did not work during said payroll period because

General Counsel's Exhibit No. 40A-B—(Continued)
they were ill or on vacation, or temporarily laid off,
or in Military Service, whose names appear on this
list.

2) A list of the names of those employees in the
unit found appropriate who were on the payroll on
October 19th, the date of the election.

This list excludes from the October 2nd list those
persons who quit or had been discharged for cause
and their employment terminated, and who have not
been rehired or reinstated prior to the election date.

3) A list of the names of all the persons whose
ballots were challenged. This list follows the order
and the number as set forth in your list. Following
each name is the date of employment, the date em-
ployment was terminated and a brief statement of
reason for termination. Of the 111 persons whose
names were challenged, we find that:

(1) 12 had terminated their employment by quit-
ting prior to the payroll period ending October 2nd,
1954;

(2) 31 had terminated their employment by quit-
ting between October 2nd, 1954 and October 19th,
1954;

(3) One had been dismissed for misbehavior and
defiance of company rules;

(4) 52 had been terminated because a double
shift operation was no longer necessary nor ad-
visable, because production was in advance of sea-
son, supply, storage and sales deliveries.

General Counsel's Exhibit No. 40A-B—(Continued)

(5) 15 are still on the payroll. Of these, 5 were challenged by L. D. Mathews, conductor of the election, because he declared they had not voted in time. The election had not, however, been declared closed and these people had been standing in line waiting their turn to vote; 6 were challenged by the petitioner—1 because the petitioner's observer did not recognize the voter, 5 because they were samplers for the laboratory and declared by the petitioner's observer as not being in the unit; 4 were challenged by the employer's observer because they were not on the October 2nd payroll.

Very truly yours,

/s/ C. B. Rose,
Executive Secretary.

cc: E. Martini

S. Bond

Source: Encl...

on Payroll October 2, 1954

GENERAL COUNSEL'S EXHIBIT No. 40-E

- 1 Averman, Charlotte—
- 2 Eldridge, Peggy—
- 3 Ferrell, Goldie—
- 4 Olson, Lawrence—
- 5 Albertoni, Ruth
- 6 Albin, Dora
- 7 Albin, Ernestine office
- 8 Allen, Lois
- 9 Allen, Marceline
- 10 Allman, Lyman
- 11 Allman, Mildred
- 12 Ameral, Isabelle
- 13 Ameral, Lina
- 14 Ames, Nora
- 15 Anderson, Caroline
- 16 Anderson, Christine
- 17 Anderson, William
- 18 Antone, Eva
- 19 Armbrust, Joyce
- 20 Augustin, Elizabeth
- 21 Augustin, Willy
- 22 Awender, Karolina
- 23 Baker, Bonnie
- 24 Bartlett, Marie
- 25 Bate, Erma
- 26 Bate, John
- 27 Bennett, Laurie
- 28 Bertoli, Gerelino *Bertoni, Joe (25)*
- 29 Bills, Julia
- 30 Blair, Ethel
- 31 Bonar, Julia
- 32 Bond, Ilene
- 33 Brennan, Ruth
- 34 Breuer, Richard
- 35 Brickner, Bessie
- 36 Bridges, Leona
- 37 Bridges, Oma
- 38 Brines, Zelma
- 39 Brock, Inez
- 40 Brown, Gladys
- 41 Browning, Billie
- 42 Browning, Doris
- 43 Burger, George
- 44 Butler, Dolores
- 45 Button, Marilyn
- 46 Byrd, Margie
- 47 Caddel, Mary
- 48 Cameron, Harriet
- 49 Carrera, Ensobia *Cassidy (47)*
- 50 Castino, Mary
- 51 Chames, Joanne
- 52 Champagne, Clara
- 53 Champagne, Elinor
- 54 Chapman, Alta
- 55 Chapman, Orland
- 56 Chapson, Louise
- 57 Chicano, Salvador
- 58 Chicano, Virginia
- 59 Cihos, Mary
- 60 Clark, Ruth
- 61 Coate, Natalie
- 62 Coats, Susie
- 63 Coffey, John
- 64 Coffey, Marie
- 65 Collins, Marie
- 66 Connors, Frances
- 67 Coppock, Irvin
- 68 Correia, Frank
- 69 Crownover, Lee
- 70 Cuttress, Evelyn
- 71 Cuttress, Valeria
- 72 Dahl, Evelyn

- 71 Darden, David
- 72 Davello, Clara
- 73 Davis, George
- 74 Davis, June
- 75 Deal, Ruthie
- 76 DeVilbiss, Robert
- 77 DeWitt, Betty
- 78 Dickerson, Elsie
- 79 Donner, George
- 80 Doty, Esther
- 81 Drake, Frances
- 82 Draper, Jessie
- 83 Draper, Joy
- 84 Duncan, Worthly
- 85 Edwards, Helene
- 86 Eilers, Myrtis
- 87 Ellis, Mary
- 88 Elmore, Eugene
- 89 Elmore, Hazel
- 90 Elmore, Jean
- 91 Elvy, Cora
- 92 Falorni, Adolfo
- 93 Fenton, Violet
- 94 Ferguson, Sarah *Ferrell (26)*
- 95 Festa, Enrico
- 96 Fishelson, Ida
- 97 Fletcher, Esther
- 98 Floyd, Elsie
- 99 Foster, Herman
- 100 Foster, William
- 101 Frank, Charlotte
- 102 Freyling, Dolores
- 103 Fribourghouse, Ernest
- 104 Gaither, Lula
- 105 Gale, Maude
- 106 Garcia, Jose
- 107 Garrison, Fannie
- 108 Gullledge, Daisy
- 109 Gullledge, Lonzo
- 110 Gullledge, Martin
- 111 Hack, Ernestine
- 112 Hall, Pastoria
- 113 Hall, Sidney
- 114 Hance, Anna
- 115 Hansen, Hazel
- 116 Hansen, Mervyn
- 117 Hanson, Ruth
- 118 Hardin, Edna
- 119 Harris, Mary
- 120 Harrison, Lucille
- 121 Hayden, Rose
- 122 Heathorne, Clark
- 123 Herrerias, Ella
- 124 Higgins, Edward
- 125 Hoffsneider, Elsie
- 126 Horland, Theresa
- 127 Horst, Ellen
- 128 Horst, Kathleen
- 129 Hovess, George
- 130 Hudson, Edna
- 131 Johnson, Irene
- 132 Johnson, Leona
- 133 Johnson, Willie
- 134 Jones, Gertrude
- 135 Jungers, Osear
- 136 Kelleher, Gerald
- 137 King, Dolores
- 138 Kounovsky, Evelyn
- 139 Kruse, Viola
- 140 Layman, Lila
- 141 Lee, Eva



GENERAL COUNSEL'S EXHIBIT No. 40-F

33 Lee, Leonard
 34 Lee, Robert
 35 Lewis, Victor
 36 Lindley, Beulah
 37 Lindsay, Gloria
 38 Loeffler, Carl
 39 Loeffler, Sandra
 40 Lyman, John *office*
 41 McAfee, Bernice
 42 McCall, Harry
 43 McCarl, Edna
 44 McCarthy, Dora
 45 McCarthy, P. W. *office*
 46 McCullough
 47 McDermott, Vita
 48 McGuire, Mary
 49 McHugh, Elizabeth
 50 McPhee, Eloyce
 51 Marquez, Mary
 52 Mahoney, Goldie
 53 Marra, Alvin
 54 Marsland, Lloyd *office*
 55 Masuoka, Frank
 56 Maw, Goldie
 57 May, Mary
 58 Mazzucchi, Nancy
 59 Miller, Hazel
 60 Mizell, Barbara
 61 Mizell, Eugene
 62 Mukaida, Esther *office*
 63 Mynock, Ada
 64 Napier, Renee
 65 Narron, Henry
 66 Nelson, Irene
 67 Nemet, Elizabeth
 68 Niemi, Selma
 69 Noble, Mary
 70 Nunes, Bernice
 71 Oandason, Andy
 72 Okubara, Makoto *office*
 73 Panelli, Ray
 74 Papera, Oliver
 75 Pate, Gloria
 76 Patterson, Marian
 77 Perry, Catherine
 78 Pesenti, Claudina
 79 Phillips, Richard
 80 Piroille, Esther
 81 Ploza, Pauline
 82 Poggi, Joseph Jr.
 83 Poncia, Anita
 84 Pool, Lorraine
 85 Pozzi, Charles
 86 Rahm, Albert
 87 Rawles, Dora
 88 Reece, Gertrude
 89 Rettela, Gertrude
 90 Reynolds, Richard
 91 Reynolds, Rosette
 92 Roca, Pauline
 93 Rodrigues, Edward
 94 Rogers, Gerald
 95 Ross, Aloa
 96 Row, Julia
 97 Rowland, Eileen
 98 Rufino, Margaret
 99 Runyon, Lillian
 100 Russell, Mary
 101 Schell, Fred
 102 Schoenthal, Elizabeth
 103 Schrum, Evelyn

79 Scott, Gertrude
 200 Scott, Merle
 1 Seidel, Mary
 2 Shields, Viteria
 3 Shreffler, Barbara
 4 Shreffler, Nancy
 5 Smith, Joyce
 6 Smith, Wayne
 22.7 Smoker, Helen
 8 Snodgrass, Robert
 9 Souza, Mathilda
 10 Stevens, Mary
 11 Storey, Clarence
 12 Struempf, Steve
 13 Stumpf, Rita
 14 Susceff, Ruth
 15 Taber, Marion
 16 Tallman, Lester
 230 17 Thomson, James
 18 Thorp, Ilah
 19 Todd, Gerald
 20 Tripp, Marie
 21 Tsurumoto, George
 22 Unciano, Froilan
 23 Urton, Etta
 24 Veach, Shirley
 25 Vernon, Amy
 26 Vessels, Stella
 240 27 Vogel, Anna
 28 Wakeland, Geneva
 29 Wasin, Edyth
 30 Wear, William
 31 Wiedenmeyer, Maria
 32 Wilder, Louise
 33 Wilson, Edith
 34 Wood, Robert
 35 Yaeger, Kenneth
 249 36 Ziegenbein, Thelma
 37 Peterson, Sylvia
 38 Bertoni, Joe
 39 Cassidy, Beulah

NATIONAL LABOR RELATIONS BOARD
 30-411035
 CASE NO. 2037 BOARD PETITIONER RESPONDENT EXHIBIT NO. 6C-40F
 IN THE MATTER OF *Ref. 1006 Jones*
 DATE *8-14-52* WITNESSES *R. Schrum*
 BY *Richard Schrum*
 RECEIVED

GC 40 f



~~Active~~ Employees October 19, 1954

Dora
Lois
Isabele
on, William
t, Joyce
n, Elisabeth
n, Willy
t, Marie
rma
i, Laurie
l, Gerelene
l, Joe
Julia
Julia
n, Ruth
Inez
Gladys
Dolores
Mary
n, Harriet
y, Beulah
o, Mary
o, Joanne
a, Orland
a, Louise
o, Salvador
o, Virginia
Ruth
a, Frances
k, Irvin
a, Frank
ver, Lee
ss, Evelyn
ss, Valeria
o, Clara
iss, Robert
o, Betty
son, Elsie
o, George
Esther
Frances
o, Eugene
o, Hazel
o, Jean
Cora
i, Adolfo
Enrico
son, Ida
o, Herman
Charlotte
ng, Delores
ng, Marcia
Maude
o, Jose
Dorothy
ge, Daisy
ge, Lonzo
ge, Alvin
Ernestine
Pastoria
Sidney
n, Edna
o, Mary
ias, Ella
n, Edward
nd, Theresa
o, Georgia
ss, John
on, Melba
on, Raymond
on, Willie
o, Cornelia
e, Gertrude

Jacobus, Vita
Kounovsky, Evelyn
Lee, Robert
Lewis, Victor
McAfee, Bernice
McCarl, Edna
McDermott
McGuire, Mary
Mahoney, Goldie
Masuoka, Frank
Mills, Lloyd
Napier, Renee
Narvon, Henry
Neel, Fay
Niemi, Selma
Noble, Mary
Oandason, Andrew
Panelli, Raymond
Papera, Oliver
Perry, Catherine
Pesenti, Claudina
Peterson, Sylvia
Poggi, Joseph Jr.
Poncia, Anita
Reece, Gertrude
Rettela, Gertrude
Rodrigues, Edward
Schoenthal, Elizabeth
Smith, Joyce *Jessie*
Smith, Wayne
Smoker, Helen
Snodgrass, Robert
Struempf, Steve
Suscoff, Ruth
Tallman, Lester
Thorp, Ilah
Todd, Gerald
Tsurumoto, George
Urton, Etta
Veach, Shirley
Vessels, Stella
Wakeland, Geneva
Wasin, Edyth
Wilson, Edith
Wood, Robert
Yaeger, Kenneth
Ziegenbein, Thelma
Zimpher, Patricia

20-1035
20-1035
CASE NO. 2637
EXHIBIT NO. 40G
IN THE MATTER OF *Sub. App. 10/19/54*
DATE 8-14-55
OFFICIAL REPORTER
BY *Richard*



GENERAL COUNSEL'S EXHIBIT No. 41A

[Letterhead of
California Association of Employers]

November 16, 1954

Mr. L. D. Mathews, Jr.
Field Examiner, 20th Region
National Labor Relations Board
630 Sansome Street
San Francisco 11, California

Re: Sebastopol Apple Growers Union
Case No. 20-RC-2637

Dear Mr. Mathews:

Attached hereto find further supplementary information requested in your letter dated November 9, regarding Case No. 20-RC-2637.

Sincerely yours,

/s/ C. B. Rose,
C. B. Rose,
Executive Secretary.

CBS/s
Enc.

GENERAL COUNSEL'S EXHIBIT No. 41B

[Letterhead of
California Association of Employers]

November 16, 1954

Mr. L. D. Mathews, Jr.
Field Examiner, 20th Region
National Labor Relations Board
630 Sansome Street
San Francisco 11, California

Re: Sebastopol Apple Growers Union
Case No. 20-RC-2637

Dear Mr. Mathews:

I now present to you a letter from the Sebastopol Apple Growers Union regarding the above case which contains the supplementary information requested by you in your letter dated November 9th.

Sincerely yours,

/s/ C. B. Rose,
C. B. Rose,
Executive Secretary.

CBR/s
Enc.

GENERAL COUNSEL'S EXHIBIT No. 41C-D

[Letterhead of Sebastopol Apple Growers' Union]

November 15, 1954

Mr. C. B. Rose, Executive Secretary
California Association of Employers
405 Montgomery Street
San Francisco, California

Re: Sebastopol Apple Growers' Union
Case No. 20-RC-2637

Dear Mr. Rose:

This letter contains supplementary information requested in Mr. L. D. Mathews Jr., letter of November 9, 1954.

Enclosed is a list of employees who were considered on our payroll on the evening shift October 15, 1954. This is the information requested in Mr. Mathews' letter under paragraph (I.E.).

Regarding statements made by representatives, including floor ladies of the Employer on October 15, 1954 to employees regarding the lay off is covered by the statement read by the General Manager, copy of which was forwarded to you on November 11, 1954. The only other statement made regarding the lay off was made by the Chairman of our Board of Directors to the effect that we had found it necessary to reduce our operation to one shift at this time. No other remarks were made concerning the lay off.

With reference to Mr. Mathews' letter of November 12, 1954, concerning challenged ballots. This is

General Counsel's Exhibit No. 41C-D—(Continued)
correct as there were ballots cast at the election
held at our plant on October 19, 1954 by persons
who were not on the October 2, 1954 payroll.

Reference to paragraph (I.E.) concerning:

- 6. Pauline Ploxa
- 12. Dora Rawles
- 15. Eusevia Correria

The above names were not read on October 15, 1954
as being those of employees who were being re-
tained. Pauline Ploxa and Dora Rawles both walked
off the job October 15, 1954.

Regarding paragraph (I.G.) this is correct con-
cerning Ruthie Deal. However, the statement about
Patricia Zimpher being laid off is incorrect. Patri-
cia Zimpher quit of her own free will and accord,
due to the fact that she could not get a baby sitter.

If there are any further questions that you would
like to have us answer, please advise.

Yours very truly,

Sebastopol Apple Growers' Union,
/s/ Elmo Martini,
Elmo Martini,
General Manager.

EM:Mc

Encl:

Castopol Apple Growers' Union
Castopol, California

GENERAL COUNSEL'S EXHIBIT No. 41-E

Name	Time in PM 10/15	Tfrd. to day shift	Worked PM 10/15	Walked off job
Merline Perry	X	10/18	X	
Andia Pesenti	X	10/18	X	
Via Peterson	X	10/18	X	
Ma Poncia	X	10/18	X	
Grude Rettela	X	10/18	X	
on Smoker	X	10/18	X	
Susoff	X	10/18	X	
Thorp	X	10/18	X	
ge Tsurumoto	X	10/18	X	
va Wakeland	X	10/18	X	
h Wilson	X	10/18	X	
ma Ziegenbein	X	10/18	X	
ine Zimpher	X		X	
Jacobus	X	10/18	X	
Johnson	X	10/18	X	
ie Johnson	X	10/18	X	
yn Kaunovsky	X	10/18	X	
ice McAfee	X	10/18	X	
McDermott	X	10/18	X	
McGuire	X	10/18	X	
ie Mahoney	X	10/18	X	
Napier	X	10/18	X	
Niemi	X	10/18	X	
Noble	X	10/18	X	
a Davello	Ill			
y De Witt	X	10/18	X	
ge Donner	X	10/18	X	
cia Drake	X	10/18	X	
Elvy	X	10/18	X	
Fishelson	X	10/18	X	
lotte Frank	X	10/18	X	
res Freyling	X	10/18	X	
ia Freyling	X	10/18	X	
e Gale	X	10/18	X	
thy Geseck	X	10/18	X	
y Gullege	Ill			
stine Hack	X	10/18	X	
Harrie	X	10/18	X	
Allen	X	10/18	X	
red Allman	Ill			
e Armbrust	X	10/18	X	
abeth Augustin	X	10/18	X	
ie Augustin	X	10/18	X	
e Bartlett	X	10/18	X	
Bate	X			X
line Bertoli	X	10/18	X	
e Bonar	X	10/18	X	
Brennan	X	10/18	X	
Brock	X	10/18	X	
res Butler	X	10/18	X	
bia Carrera	X		X	
ah Cassidy	X	10/18	X	
ador Chicano	X	10/18	X	
inia Chicano	X	10/18	X	
ice Nunes	X			X

GC 112



GENERAL COUNSEL'S EXHIBIT No. 42A

[Letterhead of Sebastopol Apple Growers' Union]

February 17, 1955

Mr. W. M. Caldwell, President
California Association of Employers
405 Montgomery Street
San Francisco, California

Dear Mr. Caldwell:

I am listing below information requested by Mr. David Karasick, attorney for the N. L. R. B., when I was with him and yourself Tuesday, February 8, 1955. This information is listed in the same manner as it was requested.

1. Total tons of apples processed last year;

(a) Fresh apples, 4603 Tons;

(b) Processed in cans, 7927 Tons;

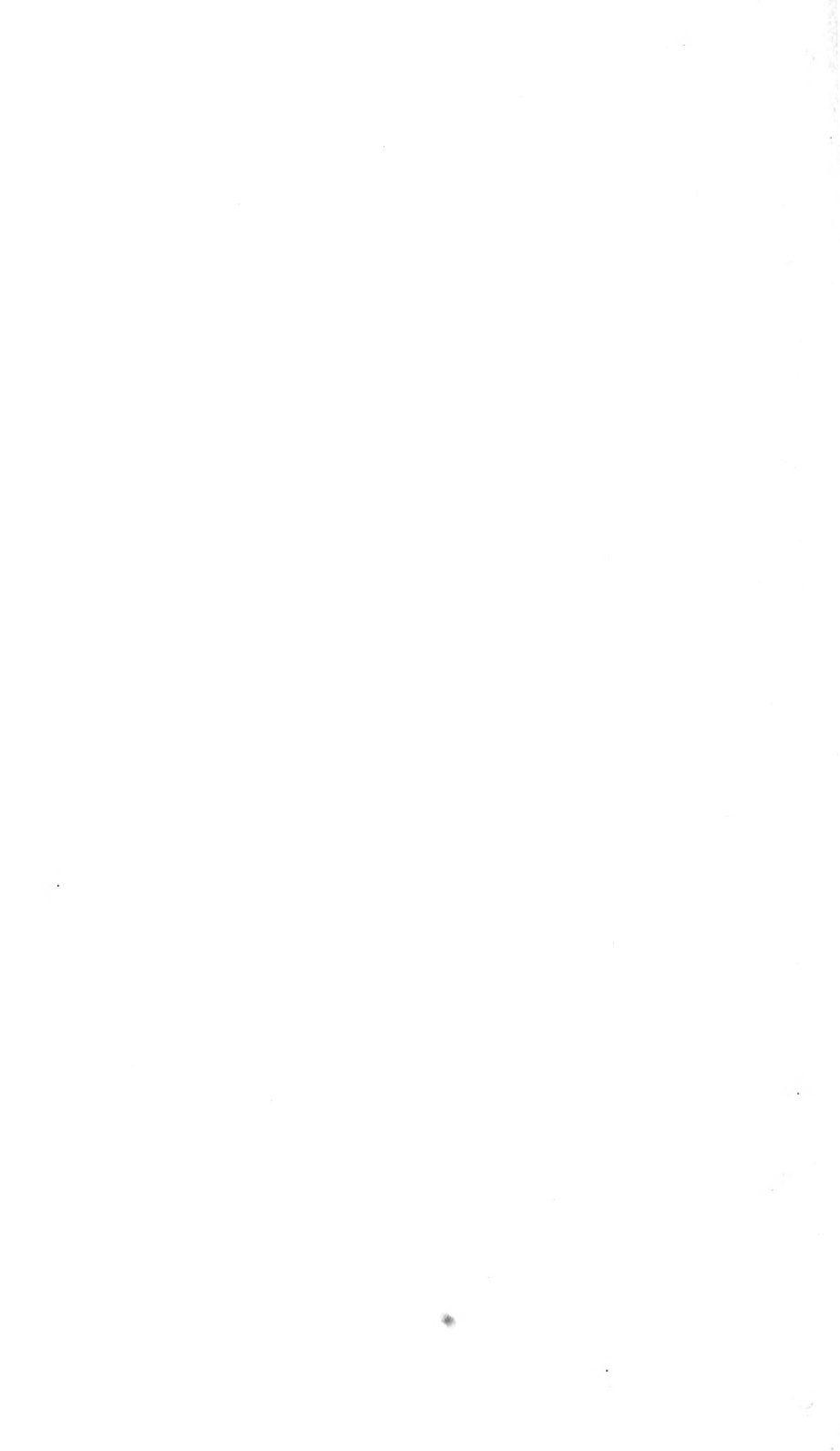
2. Attached is a list of employees who worked both day and night shifts at the beginning of business on October 15, 1954, also included in this list are the names of employees who were hired after October 15, 1954.

Regarding a copy of Tony Bondi's remarks to employees on October 15, 1954, I am unable to get his prepared statement as Mr. Bondi has advised me that his statement has been misplaced at home and evidently destroyed.

If there is any additional information you wish, please advise.

Yours very truly,

Sebastopol Apple Growers' Union,
/s/ W. H. McGuire.



GENERAL COUNSEL'S EXHIBIT No. 42-B

EMPLOYEES WHO WORKED OCTOBER 15, 1954 on
DAY AND NIGHT SHIFT

NAME	JOB	SHIFT	HIRED
nasoky, Evelyn	P&T	N	7/15/54
, Robert N.	Fork Lift	D	6/28/54
is, Victor	Whse	D	9/4/53
ffler, Carl	Maint	D	7/15/54
fee, Bernice	T	N	7/15/54
ermott, Vita	T	N	9/13/54
uire, Mary	Lab	N	7/19/54
oney, Goldie	Insp	N	7/22/54
uoka, Frank	Seamer	D	7/8/54
ls, Lloyd	Whse	D	10/11/54
ier, Renee	P&Insp	N	10/1/54
mi, Selma	T	N	8/31/54
le, Mary	T	N	7/20/54
pack, Irvin	Concent	N	6/21/54
reia, Frank	Whse	N	7/1/53
wnover, Lee	Canner-Slices	D	8/30/54
dress, Valeria	P	D	7/20/54
l, Ruthie	Can car	D	8/9/54
itt, Betty	T	N	9/27/54
kerson, Elsie	T	D	7/19/54
ner, George	Fork Lift	N	7/20/54
y, Esther	Lab	D	7/6/54
ke, Frances	T	N	7/26/54
ore, Hazel	T	D	9/29/54
ore, Jean	T	D	7/17/54
y, Cora	T	N	7/20/54
orni, Adolfo	Press	D	8/16/54
ta, Enrico	Press	D	8/16/54
helson, Ida	T	N	7/20/54
ter, Herman	Whse	D	7/20/54
nk, Charlotte	T	N	7/22/54
yling, Dolores	T	N	7/20/54
yling, Marcia	T	N	7/22/54
e, Maud	P	N	7/20/54
cia, Jose	Can Car	D	3/29/54
ek, Dorothy	T	N	8/31/54
ledge, Lonzo	Whse	D	5/1/53
ledge, Marlin	Whse	D	7/20/54
rk, Ernestine	Sorter	N	7/19/54
l, Sidney	Maint	D	8/31/54
ris, Mary	P	N	8/19/54
nolds, Rosette	Can & Trim	D	7/24/54
ini, Dora	T	D	7/15/54
en, Lois	T	N	9/13/54
ral, Isabelle	T	D	7/16/54
erson, William	Whse	N	9/9/54
aburst, Joyce	Seamer helper	N	7/16/54
ustine, Elizabeth	Insp	N	7/16/54
ustine, Willy	Clean up	N	7/23/54

20-CA-1035
74-RC-2637
NATIONAL LABOR RELATIONS BOARD

EXHIBIT NO. 42-B
DATE 8-14-55 WITNESS [Signature]
OFFICIAL REPORTER [Signature]

BY [Signature]



Continued - - Pa. 3

GENERAL COUNSEL'S EXHIBIT No. 42-D

ME	JOB	Shift	Hired
uza, Mathilda	T	N	9/27/54
ber, Marion	T	N	9/1/54
ith, Joyce W.	Whse.	N	7/17/54
tons, Bertha	T	N	10/7/54
tone, Eva	T	D	9/13/54
ldges, Oma	T	D	7/28/54
y, Mary	T	D	8/6/54
gers, Gerald	Clean-up	N	9/29/54
air, Ethel	Can Car	N	7/22/54
owning, Billie	P	N	7/20/54
owning, Dora	Clean-up	N	7/20/54
ddell, Mary	T.	N	9/13/54
nes, Connie	P	N	10/4/54
wards, Helene	Can Car	N	7/22/54
ffschneider, Elsie	T & P	N	9/7/54
fland, Theresa	P	N	9/13/54
zzucchi, Nancy	T	N	9/14/54
gel, Anna	P	D	7/15/54
lder, Louise	T & Relief	D	9/14/54
ffey, John	Stacker	D	7/19/54
ncan, Dorothy	Whse	D	9/24/54
flin, Arthur	Stacker	D	10/4/54
e, Leonard	Case Stacker	D	7/23/54
illips, Richard	Whse, Caser	D	9/24/54
orey, Clarence	Dumper	D	7/15/54
eningson, Rudolph	Whse	D	10/4/54
ciano, Froilan	Maint	D	8/24/54
are, William	Clean-up	D	7/20/54
vis, George		D	9/27/54
ibourghouse, Ernest	Press	N	7/13/54
ynolds, Richard	Flift	N	8/11/54
rtoni, Joe	Sorter B.	N	9/28/54
rden, David	Clean-up	N	7/29/54
lleher, Gerald	Whse.	N	8/27/54
ster, William	Clean-up	N	9/23/54
Call, Harry	Clean-up	N	9/29/54
rra, Alvin	Clean-up	N	7/21/54
zzi, Charles	Whse	N	9/27/54
pe, Laura	T	D	10/8/54
dera, Marie	P	D	8/4/54
hnason, Leonard	insp	D	7/23/54
use, Viola	T	D	8/7/54
yman, Leta	P & T	D	8/6/54
e, Eva	P	D	7/20/54
ndley, Beulah	T	D	8/10/54
Carthy Dora	T	D	9/29/54
Cullough, Alice	T	D	9/28/54
Hugh, Elizabeth	T-P& Relief	D	9/28/54
Phoe, Eloyce	Can Car & T	D	7/16/54
rquez, Mary	P-T & Seed Cel	D	9/11/54
w, Goldie	T	D	9/28/54
ller, Hazel	P	D	7/20/54
oyd, Elsie	T	D	9/18/54
rison, Fanny	T	D	7/15/54
ll, Pastoni	T	D	7/26/54
naon, Hazel		D	9/18/54

RC 42d



nued - - Page 4

GENERAL COUNSEL'S EXHIBIT No. 42-E

n, Edna	Insp	D	7/15/54
son, Lucille	T	D	9/29/54
n, Rose	T	D	9/7/54
ll, Gail	T	D	10/13/54

REHIREDPrevious Employment

Caddell T	10/18/54	9/13/54 - 10/15/54
elia Jones T	10/18/54	10/4/54 - 10/15/54
la Vessels T	10/18/54	7/24/54 - 10/15/54
Hance T	10/30/54	7/24/54 - 10/15/54
esa Hofland T	10/18/54	9/11/54 - 10/15/54
a Row T	10/28/54	7/22/54 - 10/9/54
h Wasin T	10/18/54	18/9/54 - 10/15/54
ie Deas T	10/23/54	8/9/54 - 10/15/54
Urton INSP.	10/18/54	7/20/54 - 10/15/54

Trimmer
 Peeler
 - Inspection
 - Clean-Up
 Driver - Truck Driver

NATIONAL LABOR RELATIONS BOARD
 20-CA-1035
 CASE NO. 20-CA-1035-2627 BOARD OF CONCILIATION AND ADJUDICATION
 EXHIBIT NO. GC-42-E
 IN THE MATTER OF Lib. Miss. Payson
 DATE 8-14-55 WITNESS Richard Smith
 BY Richard OFFICIAL REPORTER

GC 42 e



GENERAL COUNSEL'S EXHIBIT No. 42-F

of Employees hired after October 15, 1954, who had no
ous employment with SAGU.

<u>NAME OF EMPLOYEE</u>	<u>DATE HIRED</u>	<u>JOB</u>
Bollinger	10/27/54	T
Elliott	11/6/54	T
ne B. Geasland	10/22/54	T
erite H. Hayes	10/20/54	T
sa Henningsen	10/27/54	T
o Hoffman	10/22/54	T
A. Hiemes	10/30/54	T
Mary Jobe	10/22/54	T
A. Littleton	10/25/54	T
Long	10/25/54	T
l E. Nord	10/25/54	T
sa Peters	10/23/54	T
erine Poncelet	10/23/54	T
er R. Stanalea	10/30/54	Maint.

20-54-1075
CASE NO. 6635
NATIONAL LABOR RELATIONS BOARD
BOARD
IN THE MATTER OF
DATE 8-15-55
WITNESS
BY Richard
Official Reporter
EXHIBIT NO. GC-42



GC 42 f See also P. 441



GENERAL COUNSEL'S EXHIBIT No. 44
(Copy)

Sebastopol Apple Growers Union
Molino Cannery
(Day Committee)

Lena Amaral, 102 Ripley, Santa Rosa, California.
Ph. 1223 W.

Nora Ames, 3526 Brooks Ave., Santa Rosa, California. Ph. 6326 R.

Leona Bridges, 105 West Oak Ave., Santa Rosa, California.

Nina Buhrman, 3602 Brooks Ave., Santa Rosa, California. Ph. 6323 R.

Mary Castino, 2550 Bodega Rd., Sebastopol, California. Ph. 3670.

Ruth L. Deal, 105 West Oak Ave., Santa Rosa, California.

Ruth Doyle, 2341 Gravenstein Hiway So., Sebastopol, California. Ph. 3625.

Mary Ellis, 911-A Wright St., Santa Rosa, California.

Myrtis Eillers, Box 261, Brownsville, California.

Leonor Johnson, 1290 Lloyd Ave., Santa Rosa, California. Ph. 7215 R.

Violia Kruse, 624 Benjamin, Santa Rosa, California.

Lila Layman, 3602 Brooks Ave., Santa Rosa, California. Ph. 6323 W.

Eva M. Lee, 833 Ripley, Santa Rosa, California. Ph. 4916 W.

L. L. Lee, 833 Ripley, Santa Rosa, California. Ph. 4916 W.

General Counsel's Exhibit No. 44—(Continued)

Beulah Lindlay, 311 Olive St., Santa Rosa, California.

Gloria Lindsay, 2700 Sonoma Highway, Santa Rosa, California. Ph. 9321.

Mary Marquez, Box 465, Forestville, California.

Irene Nelson, 1793 Petaluma Hill Rd., Santa Rosa, California.

Dorothy Offutt, Box 7, Cotati, California. Ph. Petaluma 5 4266.

Gloria Pate, 1255 McConnell Ave., Santa Rosa, California. Ph. 678 W.

Mary Russell, 104 9th St., Santa Rosa, California. Ph. 1839.

C. E. Storey, 169 Burnett Ave., Sebastopol, California. Ph. 2403.

Orice Storey, 169 Burnett Ave., Sebastopol, California. Ph. 2403.

(List separate by request of Mr. Grami)

Otto Mowry, 343 Ragle Rd., Sebastopol, California.

GENERAL COUNSEL'S EXHIBIT No. 48-1

Authorization for Representation Under the National Labor Relations Act [A. F. of L.]

I, the undersigned, employee of Molino Plant, Sebastopol Growers Union, Sebastopol, California, authorize General Truck Drivers and Helpers Union, Local 980, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, A. F. of L., to represent me in negotiations for better wages and working conditions.

General Counsel's Exhibit No. 48-1—(Continued)

This authorization supersedes any similar authority previously given to any person or organization.

My Signature: Ruth Albertoni.

My Address: 1780 Burbank Ave., Santa Rosa.

Social Security No. 546-42-7098.

Date of Birth: March 13, 1911.

Date: Sept. 3, 1954.

Phone: 5076 R. Book No.....

GC 48(2) through GC 48(104) and GC 49(1) through GC 49(14) are identical with 48(1) except for the names and dates as follows:

Exch. No.	Name	Date
48 (2)	Dora Albini	9/7/54
48 (3)	Marceline Allen	9/28/54
48 (4)	Isabelle Ameral	8/5
48 (5)	Lena Ameral	8/10
48 (6)	Nora Ames	8/4/54
48 (7)	Caroline Anderson	9/13/54
48 (8)	Marvel Angle	10/11
48 (9)	Eva Mae Antone	9/28/54
48 (10)	Elizabeth Augustin	10/10/54
48 (11)	Karolina Awender	8/4/54
48 (12)	Erma Bate	9/10/54
48 (13)	Julia Bills	8/5/54
48 (14)	Ethel Blair	9/10/54
48 (15)	Bessie Brickner	8/13
48 (16)	Leona Bridges	8/6/54
48 (17)	Oma Bridges	8/5/54
48 (18)	Zelma Brines	9/24

Exch. No.	Name	Date
48 (19)	Gladys Brown	9/6/54
48 (20)	Nina Buhrman	8/9/54
48 (21)	Margie Byrd	8/4/54
48 (22)	Mary Elois Gaddel	9/27/54
48 (23)	Harriet Cameron	9/1/54
48 (24)	Mary Castino	8/5/54
48 (25)	Joan Chames	9/2/54
48 (26)	Alta Chapman	9/1/54
48 (27)	Louise Chapson	none
48 (28)	Mary Cihos	9/15
48 (29)	Ruth Clark	9/1/54
48 (30)	Natalie Coate	9/12
48 (31)	Susie Coats	10/8/54
48 (32)	Marie Coffey	10/11/54
48 (33)	Gatha Crump	10/11/54
48 (34)	Evelyn Cuttress	8/28/54
48 (35)	Valeria Cuttress	8/5/54
48 (36)	Evelyn Dahl	9/29/54
48 (37)	Clara Davello	9/20
48 (38)	Ruth Deal	9/1/54
48 (39)	Elsie Dickerson	8/4/54
48 (40)	Myrtis Eilers	9/11/54
48 (41)	Mary Ellis	9/11/54
48 (42)	Violet Fenton	9/3/54
48 (43)	Esther Fletcher	8/6/54
48 (44)	Elsie Floyd	9/21/54
48 (45)	Lula Gaither	9/1/54
48 (46)	Fannie Garrison	8/4
48 (47)	Josephine Geist	8/11/54
48 (48)	Ernestine Hack	8/10
48 (49)	Pastora Hall	9/2/54

Exch. No.	Name	Date
48 (50)	Ann Hance	9/1/54
48 (51)	Hazel Hansen	9/22/54
48 (52)	Ruth Hanson	9/2/54
48 (53)	Lucille Harrison	10/11
48 (54)	Rose Hayden	9/16/54
48 (55)	Gail Herrell	10/12/54
48 (56)	Elsie Hoffschneider	10/6/54
48 (57)	Ellen Hontar	9/1/54
48 (58)	Kathleen Hontar	9/1/54
48 (59)	Laura Hope	10/7/54
48 (60)	Marie Hydera	9/2/54
48 (61)	Irene Johnson	9/1/54
48 (62)	Leonor Johnson	8/4/54
48 (63)	Gertrude Jones	9/12/54
48 (64)	Viola Kruse	9/2/54
48 (65)	Lila Layman	8/9/54
48 (66)	Eva M. Lee	8/10/54
48 (67)	Beulah Lindley	9/11/54
48 (68)	Gloria Lindsay	8/4/54
48 (69)	Edna McCarl	9/10
48 (70)	Elizabeth McHugh	9/7/54
48 (71)	Eloyce McPhee	9/21/54
48 (72)	Mary Marquez	9/16/54
48 (73)	Goldie Maw	10/2/54
48 (74)	Mary May	9/3/54
48 (75)	Hazel Miller	8/4/54
48 (76)	Ada Mynock	9/20/54
48 (77)	Elizabeth Memeth	8/16/54
48 (78)	Selma Niemi	9/27
48 (79)	Bernice Nunes	8/25/54
48 (80)	Dorothy Offutt	9/1/54

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Exch. No.	Name	Date
48 (81)	Gloria Lee Pate	8/4/54
48 (82)	Esther Birolle	9/28
48 (83)	Pauline Ploxa	9/3/54
48 (84)	Lorraine Pool	9/28/54
48 (85)	Dora Rawles	9/3/54
48 (86)	Gertrude Reece	8/4/54
48 (87)	Pauline Rocca	9/28/54
48 (88)	Aloa Rae Ross	10/7/54
48 (89)	Julia Ann Row	10/12/54
48 (90)	Margaret Rufino	9/10
48 (91)	Mary Russell	8/10/54
48 (92)	Marie Scheffler	8/4/54
48 (93)	Elizabeth Schoenthal	8/9/54
48 (94)	Gertrude Scott	8/21/54
48 (95)	Vitearia Shields	8/9
48 (96)	Amy Sweningson	10/6/54
48 (97)	Nancy Tatum	10/7
48 (98)	Lois Thornton	10/9/50
48 (99)	Marie Tripp	9/16/54
48 (100)	Etta Urton	9/19/54
48 (101)	Amy Vernon	9/13/54
48 (102)	Anna Vogel	9/1/54
48 (103)	Edyth Wasin	8/9
48 (104)	Louise Wilder	9/28/54
49 (1)	Willy Augustin	10/10/54
49 (2)	John Bate	10/24/54
49 (3)	John Coffey	10/11/54
49 (4)	Ernest Fribourghouse	8/10/54
49 (5)	Jose Garcia	9/11/54
49 (6)	A. C. Heflin	10/7/54
49 (7)	Leonard Lee	8/10/54

Exch. No.	Name	Date
49 (8)	Raymond Panelli	9/3/54
49 (9)	Richard Phillips	10/4/54
49 (10)	Albert Rahm	9/28/54
49 (11)	Richard Reynolds	9/15/54
49 (12)	Wayne Smith	9/23/54
49 (13)	C. E. Storey	8/4/54
49 (14)	R. Sweningson	10/6/54

GENERAL COUNSEL'S EXHIBIT No. 51

Authorization for Representation Under the Na-
[Emblem] tional Labor Relations Act [A. F. of L.]

I, the undersigned, employee of Co-op Cannery, Sebastopol, Calif., authorize General Truck Drivers and Helpers Union, Local No. 980, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, A. F. of L., to represent me in negotiations for better wages and working conditions.

This authorization supersedes any similar authority previously given to any person or organization.

My Signature: Darlene Rearden.

My Address: 1550 Cooper Rd.

Social Security No.: 564-42-9283.

Date of Birth: Jan. 1, 1936.

Date: Oct. 8, 1954.

Phone: (neighbor) 2761.

Book No.....

1264 *National Labor Relations Board vs.*

GENERAL COUNSEL'S EXHIBIT No. 52A-B

S.A.G.U. Production for Years 1950 Thru 1954

	Sauce			Slices		Juice 6/1½ gal. 12/qts.	Con- cen- trate
	24/303	6/10	24/8 oz.	24/2	6/10		
1950							
S.C.C.							
1951	121,000	(Approx.)					
1952							
To 9/4/52	83,407	1,782					
To 11/8/52	144,544	15,887					
Rider						6,295	
1953							
Production							
To 11/20/53	242,752	6,637		100,427			745
To 12/23/53	243,853	8,337		124,039			862
S.C.C.			13,770				
Rider & Son						14,164	
Inventory							
11/15/53	142,178	844	349	33,103		8,692	112
1954							
Production							
To 10/15/54	155,830	3,050		144,835			550
To 12/11/54	202,398	11,384		186,376	1,929		840
S.C.C.	65,322		15,265				
Rider & Son						11,143	
Inventory							
10/15/54	167,009	661	14,450	57,717		12,144	185
S.C.C.—Sebastopol Cooperative Cannery.							

S.A.G.U. Shipments to Close—1953 and 1954

1953							
To 11/20	97,520	5,611	1,211	53,204		2,075	592
To 12/23	106,521	6,526	1,511	60,336		2,475	643
1954							
To 10/15	55,983	2,675	845	83,953		1,300	368
To 12/11	107,914	3,039	4,664	99,321		2,240	482

GENERAL COUNSEL'S EXHIBIT No. 53A-B
[Letterhead of Sebastopol Apple Growers' Union.]

April 8, 1955

Mr. David Karasick
National Labor Relations Board
630 Sansome Street
San Francisco 11, California

Re: Sebastopol Apple Growers' Union—Case
No. 20-CA-1035

Dear Mr. Karasick:

In accordance with your request of March 16th and your letter of March 23rd, we are submitting the following information for the years 1951 through 1954:

- (a) Eliminated on your authority;
- (b) Quantity of apples delivered to the other canneries, juice plants, dryers, or other processors;
- (c) Quantity of each product processed showing product and size of container;
- (d) Transportation costs to and from other processors;
- (e) Processing costs;
- (f) Name and address of carriers;
- (g) Inventories beginning and end of cannery operations;
- (h) Cannery fruit in cold storage 10/16/54;

General Counsel's Exhibit No. 53A-B—(Cont.)

(i) Cold storage fruit used in processing to close of cannery.

All of this information is on the schedule attached.

Trusting that this information will be of assistance to you, I am,

Yours very truly,

Sebastopol Apple Growers' Union,
By /s/ Errol D. Wilson.

EDW :as

Encl.

GENERAL COUNSEL'S EXHIBIT No. 53-C

entories

<u>Year</u>	<u>Commodity</u>	<u>Size</u>	<u>Opening Season Cases</u>	<u>Closing Season Cases</u>
1951			Unable to check	
6/30/1952	Sauce	24/303	20997	122771
11/15/1952	Sauce	24/303		13817
11/15/1952	Sauce	6/10		1156
11/15/1952	Juice	12/Qt.		396
11/15/1952	Juice	6 1/2 Gal.	2208	133600
11/15/1952	Sauce	24/303		1825
7/ 2/1953	Sauce	24/303		12259
1/ 4/1954	Sauce	6/10		60485
	Sauce	24/8oz.		8089
	Sauce	24/2		2051
	Sliced Apples	12/Qt.		208
	Juice	6 1/2 Gal.		
	Juice	55 Gal Drums	27392	
6/30/1954	Concentrate	24/303	1794	
	Sauce	24/8oz.	9517	
	Sauce	24/2	871	
	Sliced Apples		21 1/2	
	Juice			
	Concentrate			
12/4/1954	Sauce	24/303		152998
	Sauce	8/oz.		15486
	Sliced Apples	24/2		84445
		6/10		8930
	Juice			11812
	Concentrate			333
10/16/1954	Cannery fruit in Cold Storage			1396.15 Tons
	All Used In Processing			

Fresh Fruit Shipments and Dryer Deliveries:

1951 Unable to Check
 Prior to Sept. 4, 1952
 After September 4, 1952
 Prior to November 20, 1953
 After November 20, 1953
 Prior to October 15, 1954
 After October 15, 1954

Fresh

6431.93 Tons
 2188.15 Tons
 5049.72 Tons
 56.20 Tons
 4765.71 Tons
 1004.28 Tons

Dryer

1770.09 Tons
 1355.37 Tons
 995.95 Tons
 848.90 Tons
 1004.28 Tons

BOARD OF ECONOMIC RELATIONS BOARD

EXHIBIT NO. 4c 53c

IN THE MATTER OF SAGU

WITNESS Tulom

OFFICIAL REPORT

BY: Cleary

GL 53c



GENERAL COUNSEL'S EXHIBIT No. 53-D

Sebastopol
Cooperative
Cannery

H. A.
Rider
& Son

Year

Dryers

of Apples Delivered to Dryers
Processors Canning for Sebastopol
e Growers' Union (in tons)

1951 3026.51

1952 3125.46

1953 995.94 155.34

1954 867.08 1432.80

116.53

228.16

205.92

duced for Sebastopol Apple
wers' Union

Year

Size

Per case
Cost of
Production

Cases

Cases

Apple Juice

1952

12/Qt
6/3Gal

1.22

1.17

13770

3933

2362

Apple Sauce

1953

24/8oz
12/Qt
6/3Gal

1.10

1.19

1.19

13770

10880

3184

Apple Juice

Apple Juice

Apple Sauce

1954

24/8oz
24/303
12/Qt
6/3Gal

1.20

1.50

1.27

15265

65322

5593

5550

Apple Juice

Transportation Costs:

ller Trucking Co., Sebastopol, California
Apples to Sebastopol Cooperative

\$ 1.65 Per Ton

Apples to H. A. Rider, Watsonville

6.70 Per Ton

Canned Goods from Sebastopol Cooperative

2.10 Per Ton

onoma Trucking Co., Rt. 3, Box 25, Sonoma, California
Apples to H. A. Rider and Son, Watsonville

5.60 Per Ton

ould Transportation Co., Inc., 4640 Sperry St., Los Angeles, Calif.
Bottled Goods from H. A. Rider and Son, Watsonville

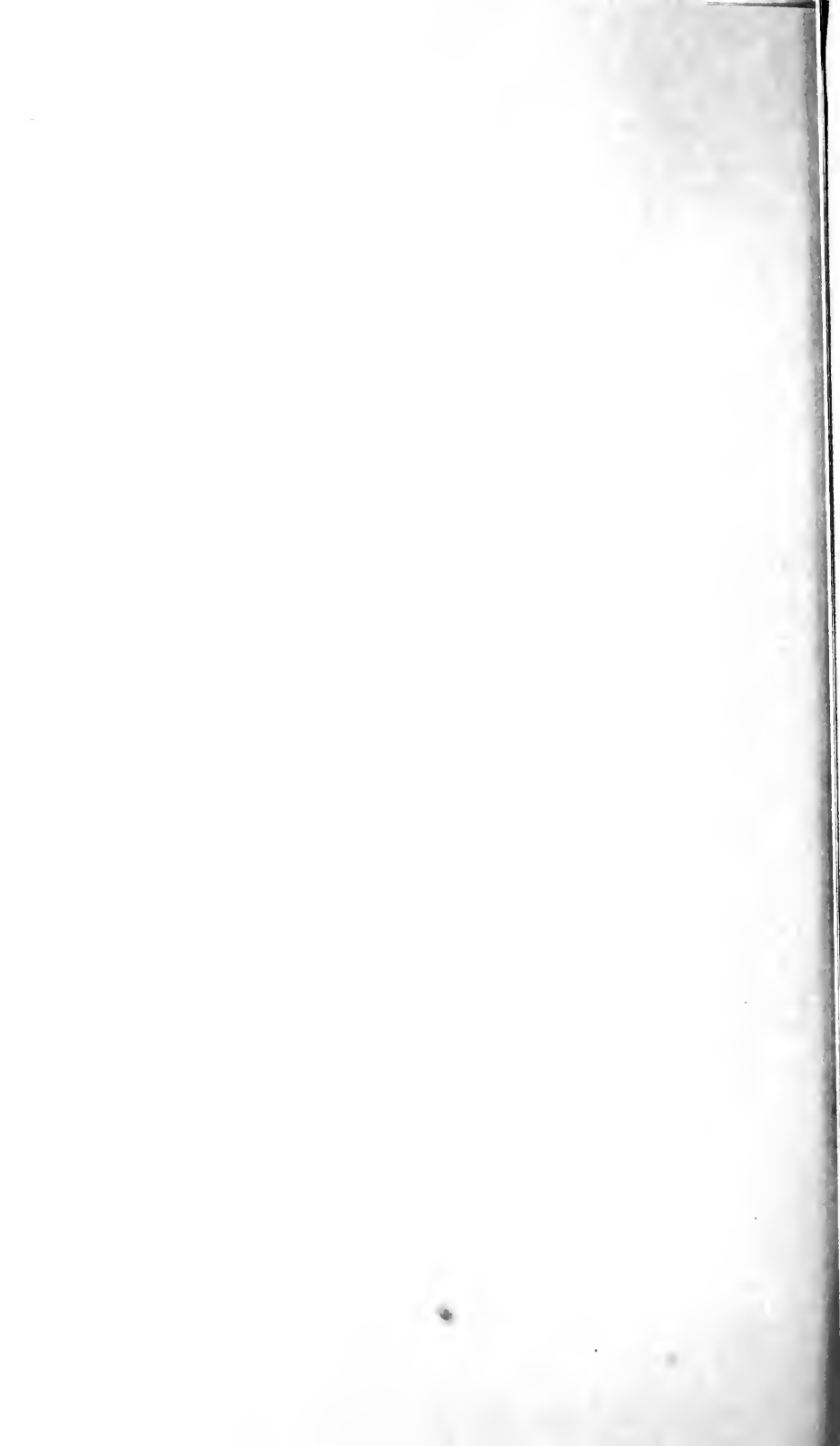
8.63 Per Ton

embers of S. A. G. U. To Sebastopol Cooperative and Dryers

2.00 Per Ton

EXHIBIT NO. 53-D
SAGU
IN THE MATTER OF
WITNESS
OFFICIAL REPORT
BY Clary

GC 53-D



GENERAL COUNSEL'S EXHIBIT No. 55

[Letterhead of Sebastopol Apple Growers' Union]

February 17, 1954

Mr. W. M. Caldwell, President
California Association of Employers
405 Montgomery Street
San Francisco, California

Dear Mr. Caldwell:

I am enclosing a list of employees whose names were read by Bill McGuire on October 15, 1954.

Regarding information as to who preceded Edna Hardin as Floor Lady on the day shift, date, etc., I submit the following information:

From July 15, 1954 to October 4, 1954, Edna Hardin was Floor Lady on the day shift. On October 5, 1954 we employed Alicia Unciano until October 15, to take Edna Hardin's place as Floor Lady on the day shift. On October 18, 1954 Mrs. Ella Herrerias assumed the job of Floor Lady to the end of our 1954 canning season.

I trust that this information will be of assistance to the National Labor Relations Board to complete their files.

Yours very truly,

Sebastopol Apple Growers' Union,
/s/ Elmo Martini,
General Manager.

EM:as
Encl.

1270 *National Labor Relations Board vs.*

GENERAL COUNSEL'S EXHIBIT No. 56A

[Letterhead of Sebastopol Apple Growers' Union]

Mr. David Karasick
National Labor Relations Board
818 U. S. Appraisers Building
630 Sansome Street
San Francisco 11, California

April 7, 1955

Dear Mr. Karasick:

Enclosed herewith are the five year averages of the disposals of our fresh fruit crop.

Very truly yours,

Sebastopol Apple Growers' Union,
/s/ Elmo Martini,
General Manager.

EM:as

Encl.

GENERAL COUNSEL'S EXHIBIT No. 56-B Calif. Apple Growers Council, Inc. - 4/1/55

APPLES -- SONOMA COUNTY
FIVE YEAR RECORD 1950, 1951, 1952, 1953, 1954
TONNAGE, PERCENTAGE, PRICES

Unpacked Fruit Delivered to Packing House or Processor

*Green Tons

	Bearing Acreage	Tons	Totals	Percentage	Price	Gross Farm Value*	Totals
<u>1 9 5 0</u>							
<u>GRAVENSTEINS</u> 7,465							
Fresh		12,650		29.0	\$96.04	\$ 1,202,256	
Canned		9,764		22.4	42.29	412,822	
Juice-Cider		5,866		13.5	31.91	187,822	
Vinegar		3,097		7.1	9.36	28,988	
Un-classified		929		2.1	37.60	34,838	
**Dried & Chops		11,231	43,657	25.8	30.67	344,456	\$ 2,211,181
<u>LATES</u> 3,409							
Fresh		4,223		22.6	96.22	406,337	
Canned		9,423		50.4	49.27	464,271	
Juice-Cider		1,267		6.8	31.07	39,366	
Vinegar		590		3.2	9.88	5,829	
Un-classified		837		4.6	43.64	36,527	
**Dried & Chops		2,338	18,678	12.6	38.28	89,498	1,041,828
			62,235	Total all Apples			3,253,009

<u>1 9 5 1</u>							
<u>GRAVENSTEINS</u> 7,267							
Fresh		10,510		22.9	56.19	590,557	
Canned		8,634		18.8	42.24	364,700	
Juice-Cider		4,830		10.6	18.46	89,114	
Vinegar		2,173		4.7	4.00	8,712	
Un-classified		438		.9	39.09	17,121	
**Dried & Chops		19,546	46,935	42.1	34.30	663,534	1,733,738
<u>LATES</u> 3,409							
Fresh		3,421		12.9	58.58	200,402	
Canned		8,649		33.6	41.74	369,357	
Juice-Cider		3,213		12.3	17.72	56,983	
Vinegar		1,552		5.8	4.00	6,208	
**Dried & Chops		9,375	26,413	35.5	36.40	341,250	974,206
			72,348	Total all Apples			2,707,943

<u>1 9 5 2</u>							
<u>GRAVENSTEINS</u> 6,792							
Fresh		17,621		29.0	71.90	1,266,960	
Canned		14,721		24.2	35.00	516,236	
Juice-Cider		2,843		4.7	17.36	49,361	
Vinegar		2,162		3.6	4.00	8,648	
**Dried		23,376	60,722	38.6	23.50	549,315	2,389,502
<u>LATES</u> 3,484							
Fresh		4,767		15.6	74.29	354,140	
Canned		11,971		39.2	45.00	538,606	
Juice-Cider		4,166		13.6	20.00	83,320	
Vinegar		280		.9	4.00	1,120	
**Dried		9,376	30,559	30.7	39.00	335,228	1,442,900
			31,281	Total all Apples			3,732,402
Pulls & Cores		10,417			40.25	42,272	44,272
						42,272	4,776,674

(Continued)

6560



Shipped Fruit Delivered to Packing House or Processor

Season 1950

GENERAL COUNSEL'S EXHIBIT No. 56-C

Bearing	Acres	Tons	Totals	Percentage	Price	Gross Farm Value*	Totals
<u>1 9 5 3</u>							
<u>GRAVENSTEINS</u> 5,416							
Fresh		24,533		59.5	\$ 52.85	\$ 1,296,539	
Canned		16,322		26.3	56.88	929,936	
Juice-Cider		4,255		8.9	57.70	150,414	
**Dried		17,000	62,110	27.3	44.27	752,550	\$ 3,158,537
<u>LATES</u> 2,910							
Fresh		4,296		14.3	135.44	581,850	
Canned		12,549		41.8	71.26	894,242	
Juice-Cider		1,914		6.4	40.19	76,924	
**Dried		11,250	30,009	37.5	70.00	787,500	2,340,518
			92,119	Total all Apples			5,479,553
Peele & Core		11,877			7.30	86,702	86,702
				<u>1 9 5 4</u>			5,565,755

<u>GRAVENSTEINS</u> 5,590							
Fresh		11,772		17.7	75.64	890,434	
Canned		19,828		29.9	56.51	1,119,893	
Juice-Cider		4,342		6.5	25.24	109,592	
Pies		180		.3	40.00	7,200	
Vinegar		2,245		3.3	12.00	26,940	
**Dried		28,143	66,570	42.3	57.16	1,608,654	3,762,713
<u>LATES</u> 3,073							
Fresh		6,577		17.9	103.41	680,128	
Canned		17,722		48.2	63.45	1,124,461	
Juice-Cider		2,925		8.0	27.86	81,461	
Vinegar		260		.7	12.00	3,120	
**Dried		9,248	36,732	25.2	58.12	537,494	2,425,664
			103,302	Total all Apples			6,193,377

5-YEAR AVERAGES -- (1950, 1951, 1952, 1953, 1954)

<u>GRAVENSTEINS</u> 6,506							
Fresh		15,417		25.4	\$ 70.32	\$ 1,049,553	
Canned		13,866		24.3	46.54	868,323	
Juice-Cider		4,431		8.4	26.13	119,259	
Dried		19,818		35.2	37.93	703,710	
<u>LATES</u> 3,257							
Fresh		4,658		18.7	93.59	444,571	
Canned		12,103		42.6	54.14	678,205	
Juice-Cider		2,698		9.4	27.37	67,812	
Dried		8,843		28.3	48.36	424,273	

RECAPITULATION OF PERCENTAGES -- 5 YEARS

	Fresh	Canned	Juice-Cider	Vinegar	Dried	Other
<u>GRAVENSTEINS</u>						
1950	29.0	22.4	13.5	7.1	25.8	2.1
1951	22.9	18.8	10.5	4.7	42.1	.9
1952	29.0	24.2	4.7	3.6	38.5	--
1953	39.5	26.3	8.9	--	27.3	--
1954	17.7	29.9	8.5	3.3	42.3	.3 (Pies)
<u>LATES</u>						
1950	22.6	50.4	6.8	3.2	12.5	4.5
1951	12.9	33.5	12.3	5.8	35.5	--
1952	15.6	39.2	13.8	.9	30.7	--
1953	14.3	41.8	6.4	--	37.5	--
1954	17.9	48.2	8.0	.7	25.2	--



GENERAL COUNSEL'S EXHIBIT No. 57

[Letterhead of Sebastopol Apple Growers' Union]

1954 - 1955

Sales: June 1, 1954 thru April 30, 1955.

	Cases	Amount	Average Per Case
Apple Sauce:			
Size—24/303	306,967		
6/10	6,466		
24/8 oz.	18,028		
	<hr/>		
Totals	331,461	\$793,329.71	\$2.39343
Pie Slice Apples:			
Size—24/2	187,717		
	<hr/>		
6/10	726		
Totals	188,443	\$695,885.12	\$3.69281

Weight of Finished Products Hauled From Sebastopol Co-op
Cannery to Molino—1,097.687 Tons.

United States of America
Before The National Labor Relations Board
20th Region

Affiant

I, Ella Herreras, ~~voluntarily~~ having been duly sworn, voluntarily depose and state:

I live at 4241 Volpert Road, Sebastopol, California. My phone is 3432.

I was first employed at the SAGU plant in Molino, California in September of 1952. I don't recall the name of the manager at that time. That manager hired me. I started on the night shift, worked nights two or three days, and then went on day shift, as did all the employees who were retained, for the balance of the season. I don't recall how long we worked in 1952. In 1952 I worked on the line; I was not a floor lady.

In 1953 I started ~~in~~ out on the day shift, on the line - not as a floor lady. After two or three weeks I traded with a girl and went on night shift. After a few days Mr. Duckworth asked me if I'd like to take the night shift floor lady job. I took it and kept it until the night shift was laid off. The lay off was about the ^{E.H. & G. merger} middle of November in 1953, as I recall. Mrs. Mary McGuire, who worked in the laboratory, was the only night shift employee, except for me, who was transferred to the day shift; the rest of the night shift was laid off.

Ella Herreras

6/58



page two (2)

We both worked on the line on day shift. I quit two or three days before the end of the 1953 season to work elsewhere. After the lay off I worked about two weeks, roughly, on day shift. In 1953, as I recall, the last night that the night shift worked was a Friday night. The first I heard of the lay off in 1953 was when I came to work that last Friday night and Mr. Silva, the superintendent at that time, told me it would be the last night. I, in turn, told the employees. The apples they ran in 1953 ~~were~~ ^{after the lay off} ~~towards the end of the season~~ ^{late apples; with a few greenstems from cold storage} ~~were mostly~~ ^{there were no} ~~late apples~~ ^{all} ~~from cold storage~~ ^{E.H.}

In 1954 I returned to work on July 9, 1954 ^{after work started a few days later,} I assisted in training the new floor lady, Edna Hardin, who had no experience in sliced pie apples. ^{The first few days} we registered the employees who reported for work assignments. It is my understanding that prior to July 9, 1954 employees were contacted by post cards and asked to report. In registering the employees we tried to give them their preference as between day shift and night shift. We did not try to put the best employees on night shift and the ones that were



page three (3)

less satisfactory on day shift. Then, during the season, when it was possible, we ~~transferred~~ granted transfers from one shift to ^{E. N.} another, although we tried to discourage this.

after the lay off on October 15, 1954 I became day shift floor lady. Elsie Dickerson worked under me then. I discharged Mrs. Dickerson. I don't recall the date I discharged her, nor do I recall the day of the week. Mrs. Dickerson was very, very talkative and disturbed other employees. She was working on the seed celler, the slicer, when I first noticed this. Then Mrs. Dickerson asked me if she could ~~be transferred~~ ^{E. N.} go back behind the lines, that is, to go on the trim belt one afternoon, and I let her. That afternoon I noticed apples in the water, in the trough, that had been double cored and then had had a core shoved in one of the two core holes. That first afternoon I noticed at least 5 or 6 such apples. When I noticed the apples that were fixed this way they were coming through the squirrel cage. I removed two such apples and showed them to the inspectors, the women who work on the second

Elsie Dickerson



page four (4)

turn belt, and asked them if there many such apples coming through. I asked Mrs. Chicano, ^{EH} as I know. Mrs. Davello, Mrs. Mahoney and one other woman were also on that belt. I also asked Mrs. Davello, but I don't recall asking the others. They replied that they had taken out a few such apples. I took one of the two such apples and showed it to Mr. Duckworth, and I said, "I've been ^{EH} watching Mrs.

Dickerson is doing this to the apples. She been watching her." Mr. Duckworth ^{EH} said, "I don't recall what Mr. Duckworth replied; he may have said to keep watching her. Before going to Mr. Duckworth with the apple I went back up the line to try and find out who was cutting up the apples this way. I went to a position behind the peelers. The peelers are elevated above the first turn belt. Mrs. Dickerson was on the first turn belt. From that position I observed the employees who were on the turn belt. There were four women on the belt, as I recall. I watched Mrs. Dickerson; she was talking away with the other women on the belt, Isabelle Amaral, Mrs. Albini, and Gertrude Jones, she was next to Mrs. Amaral, as

Therese
L. Allen





page six (6)

had put to one side. The apple was doubtly cored and had a core in it. I asked Mrs. Chicano if there had been very many and she said not as many as the day before. I took the apple and showed it to Mr. Duckworth, and asked him what I should do. Mr.

Duckworth said, "Let her go." He wanted me to let her go then and there, but I ~~we~~ didn't want there to be any disturbance and so I said we'd better wait until the end of the day and he agreed. I can't recall whether it was morning or afternoon that I spoke with Mr.

Duckworth about Mrs. Dickerson on this second day. I did not mark Mrs. Dickerson's time card until closing time that day; I marked it "released". I did not speak to Mrs. Dickerson before I spoke to Mr. Duckworth. So then

at quitting time I told Mrs. Dickerson that I was ~~the~~ sorry but ^{did} have ^{on her way} to release ~~you~~ her. She was about ^{on her way}

^{over} to time out when I told her. She said, "Why?" and I said because she'd cored the apple and put a core in it. She turned to a friend and said something like, "What

Mrs. Dickerson said, "I was only playing. I didn't mean any harm by it."

Ellen Dickerson

page seven (7)

up do you know I just got fired for
or putting an extra core in ^{the apple} playing with an apple, and that she
had done it before.

I had not seen Mrs. Dickerson
double core an apple and put a core in
it the second day, the day I discharged her.
I assumed that she had done it because
I had seen her do it the day before and
because it hadn't happened when she
was not on the belt.

I recall a woman who worked under
me ^{on} during the night shift in 1954 called
Pauline Ploxa. I hired her. She had
worked at the COOP previously, as had
Dora Rawles, a friend of Ploxa's, that
I think I hired at the same time. Ploxa
and I are both Spanish, from the same
home town, and we spoke in Spanish
together. I recall that one afternoon she
was kind of quiet and I asked her,
"What's on your mind?". Ploxa said
"there is a union meeting tomorrow,
and I don't know whether to go to it
or not." I asked her why ~~she~~ didn't
she go, and she said maybe she would.
Ploxa said, "I'll let you know who
is there." I said that if she wanted to
tell me anything it would be alright."



page eight (8)^u

So then, either the ~~next~~ day of the meeting or the day after, I stopped where Ploxa was working and I asked, "What's new?" "I don't recall her answer, but it was not much. Then ~~Ploxa~~ I said, "Was there a big crowd?", or something like that. Ploxa switched to Spanish and said, "I don't want ^{the girl next to me} ~~to~~ (meaning Dora Rawle) to know what we're talking about." But Ploxa didn't volunteer any information then, and I didn't ask for any. We did go off in a discussion, but not about anything in particular. I asked Ploxa who was at the meeting, but she didn't tell me and I didn't press her. This was before the lay off, but I can't say whether it was one or two weeks before.

Other than I have reported above, I have no recollection of any conversations with Pauline Ploxa in which the subject of the union or anything about the union came up; I have no recollection of any such conversation in the ladies restroom.

I recall that Ploxa phoned me and said she couldn't come to work one day and I said it would be alright; that Ploxa then went on to say that Mary Sidell (who I didn't know) was a trouble maker and I

2.7.
CONTINUED page nine (9)

should watch her; that Mary Sidell was a union organizer. When I said I didn't know who Mary Sidell was, Ploxa described her to me. I said the woman hadn't given me any trouble and that I hadn't seen anything out of line. She said, "Well be on your guard," and I said, "Well, thanks for the information," and hung up.

I have no recollection of asking Ploxa where her union button was the day the employees wore them to work. The day the employees wore their buttons to work was a Thursday, the day before the lay off was announced. I don't recall whether Ploxa wore a union button or not. There were very few buttons worn on the night shift that I could see. There may have been some hidden that I don't know anything about.

I recall an employee that I hired against Edna Hardin's advice in 1954, Mrs. Sarah Findsay. Later, I had to fire Mrs. Sarah Findsay for the same reasons, throwing untruncated apples in the water, that Edna had fired her at Maryona. At the same time I fired her daughter-in-law.

page ten (10)

(I don't recall her first ~~name~~ ^{name}) — (?)

Jindray, and Ethel Whye. — (?) Jindray was too slow and didn't speed up after I'd warned her. Mrs. Whye had worked at SABU in 1953. She also was extremely slow, and was somewhat ingudent as well.

I had asked that no card be sent to Whye in 1954, but one was, and I accepted her when she reported. But I had trouble with ~~Whye~~ Mrs. Whye; she talked too much and the seed cellar became a bottle neck. I told Whye to stop talking, and she turned to her neighbor and said that now she was getting bawled out by the slave driver. I had warned her about talking too much before this too. But I kept her a few days, ^{until we went back on sauce.} ~~for the rest of the shift.~~

~~I decided to let~~ ^{The} ~~that night~~ I let the two Jindrays and Whye go ^{go} too. The next morning an employee, I don't recall who it was, told me that Whye was a union organizer and that Mrs. Jindray had been talking for the union too. I hadn't heard what any of these three women had been talking about, but I had surmised that they were union. They were always talking to the other women and they would shut up when I came by.

The older Jindray, Sarah wants later that night, but I told her the other one to tell Sarah. Sarah didn't come back, although the daughter-in-law said why wouldn't see Sarah.

Tella Acquired

page eleven (11)

I told the Lindsay girl (— (?) Lindsay) I was letting her go because she was slow. After I let the three women go, I recall, Edna Hardin spoke to me, while we were at the plant, about it. She said, "You are being black balled by the union." I said, "Why?"; ~~the~~ and Edna Hardin said, "Because you fired those three women." I said that she had warned me against Mrs. Lindsay and that I took her against your advice; that I'd let the other Mrs. Lindsay go because she was extremely ~~slow~~ slow; that I'd let Mrs. Whyte go because she was continually talking and disturbing the other girls and called me a slave driver. I told Mrs. Hardin, "I got rid of three agitators, from the information the girls have given me." This was at the plant; not over the telephone. Mrs. Hardin may have said something about Mr. Duckworth having said that we were not to fire the girls who were for the union. I replied that nothing like that had ever been told to me. (Mr. Wilkins, not Mr. Duckworth, gave me my orders, generally.)

On the Monday ~~afternoon~~ ^{afternoon} of the week the lay off was announced I first

page twelve (12)

heard of the lay off. It was Monday, I'm pretty sure, when I reported to work at about 3:30 pm. Mr. Duckworth spoke to me then; he said, "We are going to one shift. You're going to be the floor lady. We're going to have the lay off Friday. You make your list and take who you want. Pick out your best workers and get as many as ~~the~~ possible who are non-union — or words to that effect.

He may have said to get rid of the pro-union people, or the "trouble makers"; I'm not sure of just how he put it. I told him I didn't know who was union and who wasn't, not too many, and so I would just have to pick out my list and I'll leave out most of the COOP girls because they came in last, and I'll try to weed out my slow ones. I said that I didn't know how many were for the union on my shift because they didn't talk much. Mr. Duckworth said, "Well, make up your list and have it ready for the office by Thursday."

So on Tuesday, the next day, I started checking my girls and finding out which were my slowest workers.



page thirteen (13)

I had a typewritten list of the names of all the girls on my shift. Mrs. McGuire gave me this list for my own personal use and information. I weeded out my poorest girls and the young girls. I checked the names of the ones I was going to let go. I think there were roughly 72 names on the list, and that I eliminated from 12 to 15 employees. The 12 to 15 employees I checked on the list to eliminate I decided upon on the basis of their relatively poor work. ~~But I don't recall~~ I recall eliminating Margaret Rufino, who had a union button on, who was very slow and did a lot of visiting as well; also Merle Scott, whose daughter-in-law Barbara Mizelle told me, in effect, that she (Merle Scott) didn't need the money and who also wore a button. Those two are the only ones I eliminated that I saw wearing a union button that I eliminated. I don't recall that I kept any employees who were wearing a union button. I don't recall seeing any employee, except for Margaret Rufino and Merle Scott, on my shift wearing a union button. If any other ^{wore union buttons} wore ~~union buttons~~.

page fourteen (14)

they were hidden or I didn't see them.

I didn't have anything except a rough idea of the relative seniority of the employees; I did not go back and check the hiring dates on the applications. Mr. Duckworth did not tell me that I was to weed out any certain number of employees; I was on my own in deciding that. Most of the girls I let go were from the COOP, but I was going to keep Pauline Ploza and Dora Rawles and Mary Cordell, all of whom were from the COOP. I am pretty sure that I still have this list that I checked; I

think it was returned to me after I turned it in to the office. I turned the list into the office on ^{Wednesday or} Thursday, the day before the lay off. As far as I know, the office eliminated only the girls whose names I'd checked; there were no changes. On Wednesday or Thursday, after my shift had started work, I was told to report to the plant office. At the meeting in the office that followed, Mr. Duckworth, Charlie Williams, Denny Shuster, Johnny Aguirre, Steve Strumpf, Ester Doty, and Mr. McGuire, and I were present. Mr. Martini was not

Ella Hennessy



page fifteen (15)

there, and neither was Edna Hardin (who was out ill). ~~Mr.~~ Mr. Mc Guire read the names of the men who were employed there, and, as he did so, the particular supervisor of the employee would say whether he wanted to retain the man or not. Steve Strumph was consulted about the men under him in this fashion. The supervisors would say "we can get along without him", or "we have too many in that ~~classification~~ ^{classification}" or remark that the man was a particularly strong union man. I don't recall Mr. Storey's name being mentioned. When they said that somebody was a strong union man the man so described was eliminated. Only the men supervisors were consulted about the men employees. Then Mr. Mc Guire read the names of the women on day shift. They discussed each woman as they went down the line. I only spoke about Lenore Johnson, I said she was definitely very strong (she had worked under me); and Louise Chapson who I said I wished they'd eliminate (I had personal reasons not connected with the union) but who they kept (they said she was

Ella Harwood



page sixteen (16)

a good con girl). Mrs. Doty spoke, rather reluctantly, about some of the girls. She said she didn't know too much. I don't recall any one of the men supervisors' commenting on the names of the women workers more than another supervisor did. Some they said were poor workers; some that they had too many and would have to release; and some that they were for the union. They would sometimes say that they were not sure that the woman was for the union, or that they didn't know. They specified how many women and how many men they wanted to keep. I think that about 27 or 30 women were retained of the day shift employees. My list wasn't discussed at this meeting, nor was it discussed with me afterwards prior to the lay off on Friday. After we finished with the women the meeting broke up.

I recall the NLRB election. It was on a Tuesday, the week following the lay off. After the election there were some women who'd been out ill at the time of the lay off that I put back to work. I also reinstated some people from the COOP after the COOP shut down.

Reverend
Ellis



page seventeen (17)

These COOP people had worked at SABU the year before. I was never instructed to recall any of the employees who had been laid off, except for Elta ~~Orton~~ (spelling?). Duckworth told me to put Elta back to work; no particular reason; she was just there and wanted work.

Mr. Matthews of the NLRB has shown me a list of names: eight typewritten pages, each bearing the statement "2-4-55. I received this list from Erma Bates. It was shown to Mr. Duckworth, Mrs. McGuire, Arny Brock, and on one occasion it was on the table in the lab at the plant," ^{THAT STATEMENT IS CORRECT.} followed by my signature. Erma Bates, an employee who worked under me at SABU, brought the list to my home at noon one day. I was preparing lunch when she came in, took the list out of her pocket and said, "Here's a list of the girls." I said, "What's that for? Where did you get it?" She said, "I got it at a meeting." Then she left. I think her son was driving her in the car; she doesn't drive. She didn't say what I was to do with the list. I don't think Erma Bates was there five minutes. I asked her if she wanted a cup of coffee, =



page eighteen (18)

but she said "no"; that she had to go. Erma was on the night shift at this time. (After the lay off, Erma was on days) This was on Saturday, October 16, 1954, the day after the lay off. I know we didn't work that day at all, so it must have been that Saturday. So then, the same day, about 5:00 pm., I phoned Mr. Duckworth at his home, I told him I'd been given the list and didn't know what to do with it. I said I was going to a friend's home out his way, would stop at his house. So I took the list to Mr. Duckworth's home and left it. I wanted to talk with Mr. Duckworth about the list, but I gathered he'd been drinking so I didn't try. I went to my friends.

My husband saw Erma Bates at my home on October 16, 1954. That night, on the way home from the party at ~~my friends~~ Louise Chapson's, I told Mrs. ^{George} Kennedy that Louise Chapson's name had been on the list; that, contrary to what Louise Chapson had told her (Mrs. Kennedy) Louise Chapson had signed a union pledge card as I knew from a list of such people I'd received that day.

6-11-54



page nineteen (19)

When I gave Mr. Duckworth the papers I asked him to return them to me the following Monday morning for sure. But on Monday, Mr. Duckworth didn't bring the papers and, when I asked about them, said he didn't remember my giving them to him. He said he'd bring them the next day. I asked him to be sure and hand them to me. The next day I was standing downstairs and he came to me and said that my papers were ~~the~~ ^{up}stairs in the desk. So I went up immediately and got the papers. Edna Hardin was there in the room when I got the papers. The papers were the papers I've referred to above that I received from Erma Bates and that I have signed under the statement dated 2-4-55. I took the papers home and ditched them ^{at the plants}. I showed the papers to ~~myself~~ Mrs. Mary Mc Guire the same day, telling her I'd received it the previous Saturday. A couple of weeks ago I showed the list to Inez Brock, again to prove the point about Louise Chapoon.

I have never told Mr. Duckworth or Mrs. Mary Mc Guire, or Mrs. Kennedy, or Inez Brock that I'd received the papers from Erma Bates.

Edna
Harris



General Counsel's Exhibit No. 58—(Continued)

page twenty (20)
and none of them asked me.

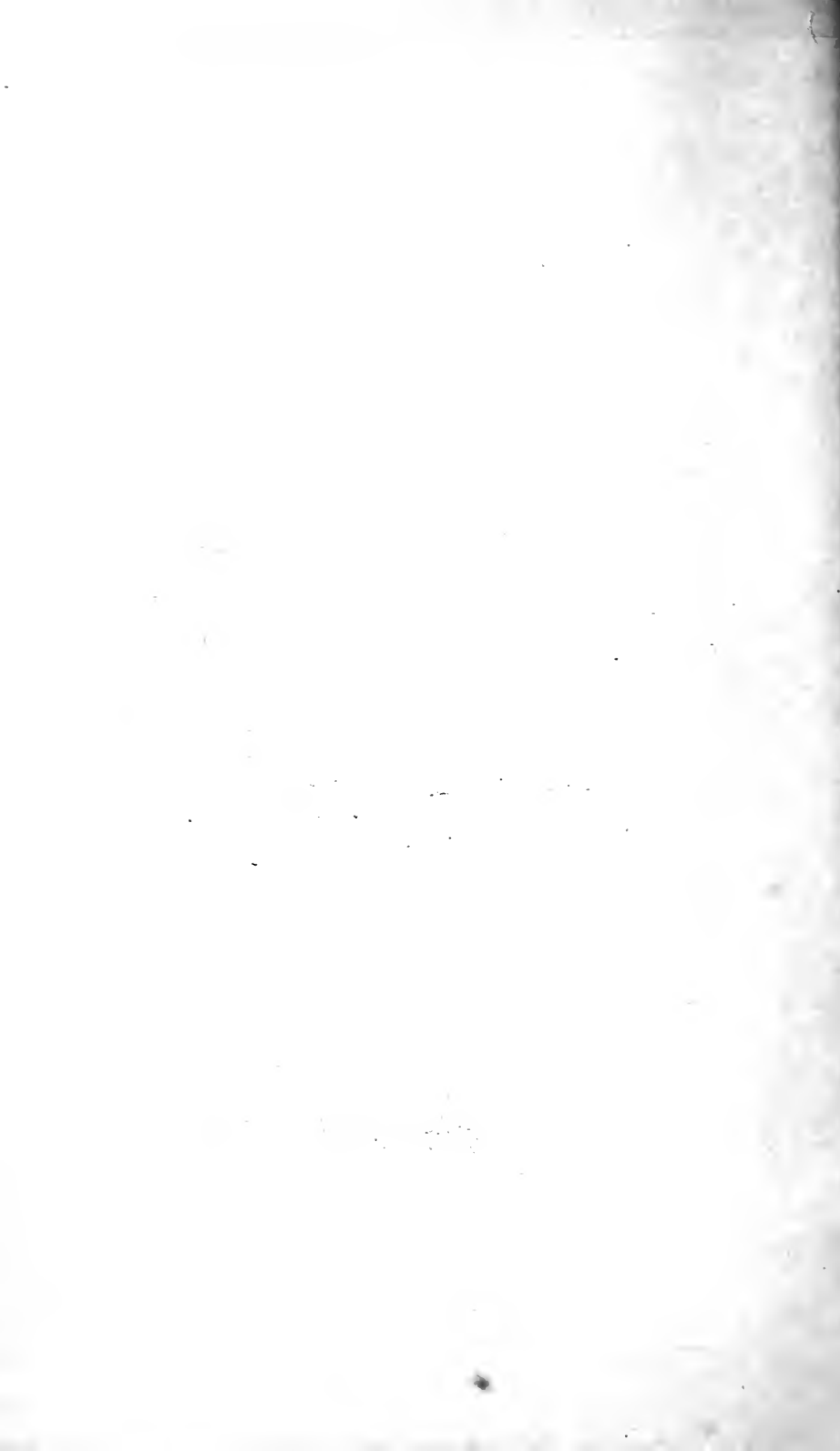
I have carefully read the above statement consisting of twenty (20) handwritten pages and swear it is true and correct to the best of my knowledge and belief.

x Ella Herrera

Sworn and subscribed to before me,
this 9th day of February, 1954 at
Sebastopol, California

x Gayle D. Matthews
Field Examiner, NLRB

x William Grami
Witness



GENERAL COUNSEL'S EXHIBIT No. 59

[Check Stub—Employee's Copy.]

Name—Gloria Pate. Emp. No.—7101. Period ending 10/23. Days or Hrs.—2. Rate—.95. Regular—1.90. Total—1.90. F.U.I.C.—.04. Dis. Ins.—.02. Inc. Tax—(blank). Deductions—.06. Net Pay—1.84. Sebastopol Apple Growers Union—Sebastopol, California.

RESPONDENT'S EXHIBIT No. 6

Mr. Gerald A. Brown February 18, 1955
Regional Director
National Labor Relations Board
630 Sansome Street
San Francisco, Cal.

Dear Mr. Brown:

I am hereby requesting to have a statement taken from me returned at the earliest convenience. This statement was taken in the Sebastopol office by Mr. Lafayette D. Mathews Jr. in the morning of Feb. 9, '55, and to me this statement was made in a very illegal, unethical and immoral matter.

I am requesting the return of this statement because at the time it was taken I was in a very highly nervous condition as I pointed this to Mr. Mathews yet he insisted to cross examine me and demand my signature that I had to sign which was about 1:30 A.M. I will try to give you a brief detail in the circumstances under which this statement was taken. In the afternoon of Feb. 8, 1955,

Respondent's Exhibit No. 6—(Continued)

I received a telephone call from Mr. William Grammi, an organizer for the A. F. of L. who wanted to know if he and a friend could come out to my house and talk to me. I told Mr. Grammi that it would not be possible to see them at my home and he ask if I could come to the Union office in Sebs. to meet his friend that it would be to my benefit if I did. I told him that I could not make it then. Mr. Grammi wanted to know if I could come down that evening and I told him that I would be there.

When I arrived at the Union office about 7:30 P.M. Mr. Grammi talked to me for about 5 or 10 minutes alone telling me that he wanted to help me, and to tell the truth to Mr. Mathews. I was introduced to your Mr. Mathews. After identifying himself, Mr. Mathews made me take an oath to tell the truth and seeing his card with his picture and U. S. Government printed placed before me, I received the impression that he was an F.B.I. man and not a labor man. He also stated that since I was under oath to tell the truth, otherwise I would be committing purgery. Mr. Mathews then proceeded to ask me many questions and to question me about many things over a period of six hours. He also made me initial corrections of the statement which he was writing and sign my name on each page. After he had finished his questioning and writing up the statement, he again made me take an oath and asked me if I would sign the statement right then. I told him I was quite tired

Respondent's Exhibit No. 6—(Continued)

and confused and did not know what I was doing and I asked him if it was necessary for me to sign right then. He said that it was. So after going through an ordeal of some six hours of very trying circumstances and of great mental and physical strain, I was compelled to sign the statement. This was at 1:30 A.M. of Wednesday, February 9, 1955.

I am sure Mr. Brown that you will not tolerate such action on the part of one of your employees of taking such statement under these circumstances and that you will see that this statement is promptly returned to me.

Thanking you in advance, I remain, yours truly,

Mrs. Ella Herrerias.

RESPONDENT'S EXHIBIT No. 8

Employment Application

Date: May 24, 1954

Print name in full: Storey, Clarence E.

Permanent address: Burnett Ave., Seb., Calif.

If married, give wife or husband's full name—Storey, Orice.

Social Security Account No.: 439-09-0854. Male [X]. Date of birth: Jan. 11-1911.

In case of accident notify: Orice Storey. Relationship: Wife. Address: Same. Phone: Seb. 2403. Dumper.

Signature of Applicant: /s/ C. E. Storey.

RESPONDENT'S EXHIBIT No. 12

Regular Meeting of the Board of Directors October 12, 1954 Sebastopol Apples Growers' Union

Present: Bondi, Guerrazzi, Winkler, Miller, Roberts, Cordoza, Hankins, Batten.

Absent: Briggs.

Chairman Bondi called the meeting to order at 7:45 p.m.

The Minutes of the Regular Meeting of September 15, and Special Meeting of September 28 were approved as mailed.

Mr. Oscar Hallberg and Mr. Frank Trigiero were present and asked the Board of SAGU wished to become a member of the National Apple Institute. Mr. Hallberg stated that the California Apple Growers Council would be host to the National Apple Institute next year at their convention which will be held in San Francisco. An assessment of 5c per green ton from processors and packers in this area would give their organization sufficient funds to retain an office in Sebastopol on a year around basis, and could be under the direction of Mr. Frank Trigiero. After discussing the matter, the Board stated that they were in favor of this assessment, and would retain membership in the Apple Growers Council, which actually is a part of the National Apple Institute.

The Manager gave a report on the fresh fruit movement and cannery production, in both sauce and slices. The Manager stated that our warehouses

Respondent's Exhibit No. 12—(Continued)

were becoming filled very rapidly and our production was up considerably over last year.

A discussion was held by the Board regarding the production in the cannery and warehouse space available. Also discussed was the remaining fruit to be harvested and brought in to our plant. Estimated tonnage to be brought in by our growers was approximately 250 tons, and considerable amount of this would be shipped fresh. After a lengthy discussion on the matter the Board felt that due to these conditions, it would be advisable to go on a one shift basis in our cannery, as the warehouse space was practically filled and movement of canned merchandise at this time was far less than our production. Winkler motioned seconded by Guerrazzi that the Board go on record in favor of closing our night shift in the cannery as soon as feasible, and this matter be left up to the discretion of the Manager. Motion unanimously passed.

Roberts motioned, seconded by Cordoza that the Manager be authorized to apply for a loan of \$250,000.00 from the Bank of America. Motion carried.

Mr. Wilson read in detail the Balance Sheet of SAGU as at September 30, 1954.

The Manager stated that Gerbers were interested in purchasing a quantity of Red Romes from us. After discussing the matter, it was felt that we review our requirements before a decision be made.

There being no further business to be brought be-

Respondent's Exhibit No. 12—(Continued)
fore the meeting at this time, the meeting was adjourned at 11:40 p.m.

/s/ Lee Guerrazzi,
Secretary.

I certify that this is a true copy.

/s/ Lee Guerrazzi,
Secretary.

RESPONDENT'S EXHIBIT No. 13

The following employees are asked to report for work Monday morning, October 18th.

Albini, Dora; Allen, Lois; Allman, Mildred; Ameral, Isabele; Armbrust, Jouce; Augustin, Elizabeth; Bartlett, Marie; Bate, Erma; Bertoli, Gereline; Bills, Julia; Bonar, Julia; Brennan, Ruth; Brock, Inez; Brown, Gladys; Butler, Dolores.

Caddel, Mary; Cameron, Harriet; Castino, Mary; Chapson, Louise; Chicano, Virginia; Clark, Ruth; Cuttress, Valeria; Davello, Clara; Deal, Ruthie; DeWitt, Betty; Doty, Esther; Drake, Francis.

Elmore, Hazel; Elmore, Jean; Elvy, Cora; Fishelson, Ida; Frank, Charlotte; Freyling, Dolores; Freyling, Marcia; Gale, Maude; Gesek, Dorothy; Gullledge, Daisy.

Hack, Ernestine; Hardin, Edna; Harris, Mary; Herreias, Ella; Howes, Georgia; Jacobus, Vita R.; Johnson, Melba; Johnson, Willie; Jones, Gertrude; Kounovsky, Evelyn; McAfee, Bernice; McDermott,

Respondent's Exhibit No. 13—(Continued)

Vita; McGuire, Mary; Mahoney, Goldie; Mizell, Barbara; Napier, Rennie; Niemi, Selma; Noble, Mary.

Perry, Catherine; Pesenti, Claudia; Reynolds, Rosette; Poncia, Anita; Rettela, Gertrude; Reece, Gertrude; Schoenthal, Elizabeth; Smith, Jessie; Susoff, Ruth; Thorp, Ilah; Veach, Shirley; Wake-land, Geneva; Wilson, Edith; Zimpher, Patricia.

Men

Anderson, William; Augustin, Willy; Bennett, Laurie; Bertoni, Joe; Bressie, Elbert; Chapman, Orland; Coppock, Irvin; Correria, Frank; Crown-over, Lee; DeVilbiss, Robert; Donner, George.

Falorni, Adolfo; Festa, Enrico; Foster, Herman; Garcia, Jose; Gulledge, Lonzo; Gulledge, Martin; Hall, Sidney; Heflin, A. C.; Higgins, Edward (Jim); Jiminez, John; Johnson, Raymond; Jun-gers, Oscar; Lee, Robert; Lewis, Victor; Masuoka, Frank; Mills, Lloyd; Chicano, Salvatoe.

Narron, Henry; Neel, Fay; Oandason, Andy; Panellin, Ray; Papera, Oliver; Poggi, Joseph; Rod-riquez, Edward; Smith, Wayne; Snodgrass, Rob-ert; Struempf, Steve; Tallman, Lester; Todd, Ger-ald; Tsurumoto, George; Wood, Robert; Yeager, Kenneth.

RESPONDENT'S EXHIBIT No. 14A

Sebastopol Apple Growers
Deliveries and Usage—1953

Deliveries (In Tons)

Fresh	8,372.19
Cannery	4,583.17
	<hr/>
	12,955.36

Usage (In Tons)

Packed fresh.....	4,510.30
Processors	595.62
	<hr/>
	5,105.92
Delivered to dryers.....	995.94
H. A. Rider	228.16
Sebastopol Coop. Cannery ...	155.34
Cannery	6,470.00
	<hr/>
	12,955.36

Cannery Production

Size 303 (1 lb. 1 oz.).....	132,269
	111,584
	<hr/>
	243,853
Size 307 (#2) (20 oz.).....	75,256
	48,783
	<hr/>
	124,039
Size 610 (6 lb.-10 oz.).....	3,441
	4,896
	<hr/>
	8,337
Size 211 (8 oz.) (Packed by S.C.C.).....	13,770

RESPONDENTS' EXHIBIT No. 14-B

Astopol Apple Growers' Union

Clayton H. Delmonico
June 1963 - 1964

No.	Variety	Total Delmonico		Quince	Cull's	No. 1 Cannery	Back But	
		Cannery	Packery				Quince	Regular
	Alexander	13227		178		13049		
	Arkansas Black	25869		4568		21301		
	Baldwin	289895		23222		266673		
	Beltflower	95159		7292		87867		
	Blue Boy	5261		1024		4937		
	Black Beauty	71516		3520		67996		
	Bonar, Trunks.		46546	130	20961			19455
	Cook Seedlings	12592		303		12289		
	Golden Delicious		84177		18362			65815
	Golden Delicious		710880	37730	416411			256739
	Greenstein		3191744	298242	1014690			218181
	Greenstein		8752121	147600	4191952			212589
	Greenstein	4600351		497912		4102437		
	Greenings	1213797		66707		1147000		
	Hawkeye	964				964		
	Improved Late Harvest		1783		420			1357
	Jonathan		921603	10647	371719			339237
	Jonathan		501984	18892	265580			25012
	Quince	5119		5119				
	King David	1108		32		1076		
	Kings	359173		7052		351621		
	Late Harvest		41742		6682			35660
	Late Harvest	3216	3162	297	406	3216		2439
	Macintosh		51228	2	8985			21241
	Macintosh		40933	723	22887			27323
	Mixed Late	31397		5083		26314		
	Mock Honey	489	22946	128	6523	489		15495
	Mock Honey	24201		1417		22784		
	Mutson Pippins	476444		52722		423772		
	Parmain	6196		92		4102		
	Red Delicious		4013		823			3190
	Red Delicious	265		16		249		
	Red Green		124278	2196	30444			81315
	Red Green		21143	120	4933			12872
	Red Rome		372616	5781	162383			204450
	Red Rome		205921	8390	114033			83498
	Redbrook Trunks	60241		153	29070			31013
	Redbrook Trunks		5315	112	2176			3633

1303

Page # 2

Delaware Apple Growers Union
Receipt of Deliveries
Year 1953-1954

Variety	Potomac Delivered		No. 1	Pack Out	
	Canners	Packing	Canners	Choice	Regular
Smith Cider	16850	11744	15670		
Spitzenberg	284263	51721	232542		
Standard Delicious		115783	464		86801
Standard Delicious		351476	13793		185415
Standard Delicious			28018		
Standard Delicious			152268		
Standard Delicious	1084445	56639	1027806		
Standard Delicious		321046	48415		
Standard Delicious		494701	16810		
Standard Delicious			251727		
Standard Delicious				54252	217009
Standard Delicious				45234	186930
Standard Delicious	324263	5973	318290		
Standard Delicious	141447	21538	119909		
Standard Delicious	15712	653	15059		
Standard Delicious	61489	2540	58949		
Standard Delicious	682	18	664		
Standard Delicious	9166340	16744387	1380098	7160694	8349321
Standard Delicious				128033	8597581
Standard Delicious	469317	9372.19			
Standard Delicious		4683.17			
Standard Delicious		<u>12455.36</u>			

Packing Fruit:

RESPONDENT'S EXHIBIT No. 14-C

NATIONAL LABOR RELATIONS BOARD
20CA1035 BOARD
CASE NO. ~~RC-372~~ PETITIONER
RESPONDENT
EXHIBIT NO. Resp 14C
IN THE MATTER OF Sak. Apple Growers
DATE 1 WITNESS
OFFICIAL RESPONSE
BY P.T.R.

RESPONDENT'S EXHIBIT No. 15-A
Sebastopol Apple Growers Union
Deliveries & Usage
1954

Deliveries: (2 Ins)

Fresh
Cannery

1137121
536983
1674104

Usage: (2 Ins)

Packed fresh
Provisions

464848
112151
576999
86708

Deliveries
Sebastopol Coop. Cannery
H.A. Baker
Cannery

143280
20592
246525 1674104

Cannery Production:

Size 303

(Packed by S.C.C.)

124939
77459
202398
15322 267720

Size 307 (+2)

113747
72629 116376

Size 610

9820
1564 11384

Size 211 (Packed by S.C.C.)

15265

NATIONAL LABOR RELATIONS BOARD

20CA1035 BOARD
CASE NO. 20-237 PETITIONER
RESPONDENT EXHIBIT NO. 15A

IN THE MATTER OF Sebastopol Apple Growers Union
DATE _____ WITNESS _____

Official Reporter

BY _____

Re 20-237

GROWERS' DELIVERY JOURNAL

SEBASTOPOL APPLE GROWERS UNION
SEBASTOPOL, CALIFORNIA

1366

Checking Summary
To Nov. 30. 1936

Red
Lime
from
Sebastopol.

		P1079 CNO. 1		P178 AND SMALLER CNO. 2		P1474 CNO. 3		P1079 CNO. 4		POIBLE CNO. 5		P1079 CNO. 6		MEMO		PREVIOUS BALANCE		DATE	REFE- RENCE	P O Y E S		PALLET		MEMO
VARI- ETY		DELIVERIES PER DAY		TO DATE		P1079 CNO. 1		P178 AND SMALLER CNO. 2		P1474 CNO. 3		P1079 CNO. 4		GROWER'S NAME		DOES				IN		OUT		
		11568	607	600	190			270	1201					Black Jonathan										
		13177	9474	209	209			270	1201					Black Jonathan										
		16930	18104	340	430			270	1201					Golden Delicious				101 22	5300-					
		979730	22419	3598	8309			270	1201					Golden Delicious				101 22	12073-					
		4167416	720577	43192	16584	7462	164361	1423431						Jonathan				31 13	7403-					
		11741000	426517	45730	62473	34337	50373	543866						Jonathan				62 13	17174-					
		861500	431008	51080	74740			303918						Jonathan				114 13	15466-					
		145660	474134	145491	197970	22050		1797931						Jonathan				94 23	20267					
		134199												Jonathan				30 13	474					
		27401	14500					7271	3100					Jonathan				98 23	412					
		11312	5812	1700	2000			5812						Jonathan				146 23	268					
		12700	7000					5812						Jonathan										
		1009				600		609						Jonathan										
		424290	26290	1210	2370			12668						Jonathan				101 23	826					
		27203	11493	1500	5020			10630						Jonathan				99 23	467					
		124999	47091	7000	6811	1957	7000	37897	1237					Jonathan				173 23	2447					
		94905	24707	4698	4708	7100	20326	21387	10069					Jonathan				177 23	1980					
		197865	102091	7000	6300			86914						Jonathan				140 23	3085					
		583321	23497	17916	44086			28197						Jonathan				98 23	8167					
		457274	13017	3375	3609	6000	3774	9659	5766					Jonathan				112 23	940					
		1905	7013	307	317	476	330	7000						Jonathan				125 23	110					
		406681	205931	32388	27704			62760						Jonathan				108 23	2465					
		406771	190846	12401	23680	8776	6553	16473						Jonathan				101 23	5290					
		9169	5557	100				349						Jonathan				100 23	165					
		423406	258878	26600	21083	1696	178	68215	46308	1000				Jonathan				101 23	9725					
		663497	37397	26116	54186			199970	7720					Jonathan				101 23	12732					
		8710	4158	40	360			4158						Jonathan										
		470	298	40	40			70						Jonathan										
		21401	11735	1766	1440			6460						Jonathan										
		27203	11493	1500	5020	1957	7000	37897	1237					Jonathan										
		1171121												Jonathan										
		27203	11493	1500	5020	1957	7000	37897	1237					Jonathan										
		1171121												Jonathan										

NATIONAL LABOR RELATIONS BOARD
STATE OF CALIFORNIA
EXHIBIT NR. 20515
IN CASE MATTER OF Sebastopol Apple Growers
DATE 11/21/36 WITNESS Official Response
BY Official Response

3PK 1/2 1/2 1/2
Calle 9405176

9405173







RESPONDENT'S EXHIBIT No. 16

Sebastopol Apple Growers' Union
Sebastopol, Calif.Deliveries to Sebastopol Cooperative Cannery
1954

Date	Weight	Date	Weight
7-23	10,274	9-21	9,926
	10,218		9,912
7-24	10,909		19,958
	10,195		9,909
	10,300		9,900
7-26	9,860		9,935
	10,133	9-22	10,075
7-27	9,924		9,972
	10,143		10,086
	10,162		10,269
	10,203		10,189
7-29	37,800		20,464
9-13	30,240		30,240
	10,138	9-23	30,240
	10,235		10,329
	10,135		10,252
	32,776		20,558
	9,572	9-23	10,075
9-14	10,149		20,247
	9,975		10,329
	26,384	9-24	9,729
	30,240		10,015
9-16	9,852		19,927
	10,220		10,528
	19,957	9-27	23,520
	19,574		6,720
	19,880		7,659
	20,072		3,349
9-20	30,240		5,674
9-21	20,160		9,203
	9,855		8,576
	9,855		9,832
	10,012		17,896
	9,835		19,574

Respondent's Exhibit No. 16—(Continued)

Date	Weight	Date	Weight
9-28	1,489	10-2	10,126
	10,335		10,195
	19,798		10,186
	10,072		8,346
	20,184		21,704
	9,843		10,209
	19,988		20,101
	10,103		10,675
	10,072		20,447
	20,081		10,189
9-29	4,898		20,358
	4,020		10,309
	811	10-4	19,584
	10,305		10,138
	20,030		20,164
	10,152		5,744
	19,735		9,516
9-30	9,001	10- 5	5,674
	9,778		5,472
	9,755		19,841
	10,083		20,073
	10,118		9,558
	20,084		19,947
	9,889		9,598
	19,824		10,418
	1,938		20,327
10- 1	10,126		9,915
	19,870		20,507
	10,275	10- 6	10,112
	9,889		20,421
	19,901		10,072
	9,975		10,672
	19,607		19,944
	10,092	10- 7	10,812
10-1	20,107		20,538
	9,406		21,090
	10,292		10,129
	20,504		20,364

Respondent's Exhibit No. 16—(Continued)

Date	Weight	Date	Weight
10-7	10,255	10-11	9,675
	20,284		9,615
	10,312		20,310
	10,212	10-12	20,000
	10,335		10,752
	20,664		20,107
	10,138		10,152
10- 7	10,242		20,720
	18,627		9,769
	10,035		19,507
	10,408		11,052
	10,135	10-13	9,832
	10,125		9,829
	21,204		10,275
10- 8	10,438		20,804
	10,769		9,829
	10,375		20,756
	20,516		10,375
	10,412		21,416
	10,649		10,432
	20,293	10-14	9,959
	9,895		19,850
	20,401		10,049
	20,224		9,992
	9,572		20,187
	9,864		9,823
	19,338		19,696
	19,747	10-15	19,576
	9,733		9,972
	5,600		3,450
10-11	19,987		8,627
	9,858		8,627
	10,152		
	20,158		
			<hr/> 2,865,602

RESPONDENT'S EXHIBIT No. 17

Sebastopol Apple Growers' Union
Sebastopol, Calif.

Deliveries to H. A. Rider & Sons—1954

Date	Weight	Date	Weight
8-9	39,569	9- 8	34,648
8-18	35,163	9- 9	35,210
8-21	36,140	9-10	35,142
8-23	30,802	9-11	34,930
8-25	36,388	9-15	33,856
9- 3	35,511	9-17	24,484
			<hr/>
			411,843

RESPONDENT'S EXHIBIT No. 22

1954 ANNUAL AGRICULTURAL REPORT FOR SONOMA COUNTY

COMPILED BY THE SONOMA COUNTY DEPARTMENT OF AGRICULTURE

FRUIT AND NUT CROPS

OP	BEARING ACREAGE	PRODUCTION	GROSS FARM VALUE 1/	TOTAL
enstein	5,590	11,772 tons @ \$ 75.64	\$ 890,434	
ash 2/		19,888 tons @ 56.31	1,119,893	
nned		4,342 tons @ 25.24	109,579	
ice-Cider		180 tons @ 40.00	7,200	
es		2,245 tons @ 12.00	26,940	
egar		28,143 green tons @ 57.16	1,608,675	
ied		66,570 total tons		\$ 3,762,721
2	3,073	6,577 tons @ 103.41	680,127	
ash 3/		17,722 tons @ 63.45	1,124,498	
nned		2,925 tons @ 27.85	81,454	
ice-Cider		260 tons @ 12.00	3,120	
egar		9,248 green tons @ 58.12	537,540	
ied		36,732 total tons		2,426,739
ES	506	572 tons @ 300.00	171,600	
ocessed		95 tons @ 375.00	35,625	
ash				207,225
WINE	11,351	22,452 tons @ 50.00	1,122,600	
ack		6,048 tons @ 43.00	260,064	
ite				1,382,664
1,778		8,453 tons @ 72.50	612,843	
nned		764 tons @ 45.00	34,380	
ctar & Juices		50 tons @ 80.00	4,000	
ash		975 green tons @ 40.00	39,000	
ied				690,223
119		272 tons @ 53.50	14,552	
nned		500 lugs @ 1.50	750	
ash				15,302
ench	13,821	12,971 tons @ 250.00	3,242,750	
perial	2,320	874 tons @ 340.00	297,160	
verted		4,139 tons @ 40.00	165,560	
3,705,470				
211,680				
15,500				
\$12,417,524				
ORCHARD	155			

ked fruit delivered to packing house or processor.
 avenstein - 560,540-42 lb. box @ \$1.60.
 tes - 298,966-44 lb. box @ \$2.33.



RESPONDENT'S EXHIBIT No. 23

1953 ANNUAL AGRICULTURAL REPORT FOR SONOMA COUNTY

COMPILED BY THE SONOMA COUNTY DEPARTMENT OF AGRICULTURE

FRUIT AND NUT CROPS

<u>CROP</u>	<u>BEARING ACREAGE</u>	<u>PRODUCTION</u>	<u>GROSS FARM VALUE 1/</u>	<u>TOTAL</u>
<u>APPLES</u>				
Gravenstein	5,416	584,125 boxes ●	2.22	\$1,296,757
Late Varieties	2,910	195,285 boxes ●	2.98	581,949
<u>Processed</u>				
Gravenstein				
Canned		16,322 tons ●	56.88	928,395
Cider-Cider		4,255 tons ●	37.70	160,413
<u>Late Varieties</u>				
Canned		12,549 tons ●	71.26	894,242
Cider-Cider		1,914 tons ●	40.19	76,924
<u>Dried</u>				
Gravenstein		17,000 green tons ●	44.27	752,590
Late Varieties		11,250 green tons ●	70.00	787,500
<u>Is and Cores</u>				
Negar-Wine		11,877 tons 3/ ●	7.30	86,702
				\$ 5,565,472
<u>GRAPES</u>	518			
Processed		832 tons ●	260.00	216,320
Fresh		100 tons ●	300.00	30,000
				246,320
<u>PEACHES, WINE</u>	11,689			
Black		22,500 tons ●	43.75	984,375
White		5,500 tons ●	33.75	185,625
				1,170,000
<u>PEACHES</u>	1,802			
Canned		4,406 tons ●	72.50	319,435
Dried		290 green tons ●	17.50	5,075
Fresh		50 tons ●	80.00	4,000
				328,510
<u>PRAIRIES</u>	132			
Canned		48 tons ●	58.00	2,784
Fresh		1,000 lugs ●	1.50	1,500
				4,284
<u>RAISINS</u>				
French	13,778	9,072 tons ●	250.00	2,268,000
Imperial	2,362	1,031 tons ●	300.00	309,300
				2,577,300
<u>NUTS</u>	1,480	430 tons ●	450.00	193,500
<u>C. ORCHARD</u>	125			12,500
				\$10,097,886

Maked fruit delivered to packing house or processor.

Fresh apples - Gravensteins, 42 pound box; Lates, 44 pound box.

Do not include this figure in calculating total production - a by-product of
canned and dried apples.



CERTIFICATE

This is to certify that the attached proceedings before the National Labor Relations Board for the 20th Region in the matter of: Sebastopol Apple Growers Union and General Truck Drivers, Warehousemen and Helpers Union, Local No. 980, AFL, Case No. 20-CA-1035 and Sebastopol Apple Growers Union, Employer, and General Truck Drivers, Warehousemen and Helpers Union, Local No. 980, I.B.T.W.C. & H. of America, AFL, Petitioner, Case No. 20-RC-2637, were had as therein appears, and that this is the original transcript thereof for the files of the Board.

ACME REPORTING COMPANY,
Official Reporters.

(2)

1. The first part of the paper is devoted to a discussion of the

main results of the paper.

2. The second part of the paper is devoted to a discussion of the
main results of the paper.

3. The third part of the paper is devoted to a discussion of the
main results of the paper.

4. The fourth part of the paper is devoted to a discussion of the
main results of the paper.

5. The fifth part of the paper is devoted to a discussion of the
main results of the paper.

6. The sixth part of the paper is devoted to a discussion of the
main results of the paper.

7. The seventh part of the paper is devoted to a discussion of the
main results of the paper.

No. 16117

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SEBASTOPOL APPLE GROWERS UNION, RESPONDENT

**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JEROME D. FENTON,

General Counsel,

THOMAS J. McDERMOTT,

Associate General Counsel,

MARCEL MALLET-PREVOST,

Assistant General Counsel,

OWSLEY VOSE,

MELVIN J. WELLES,

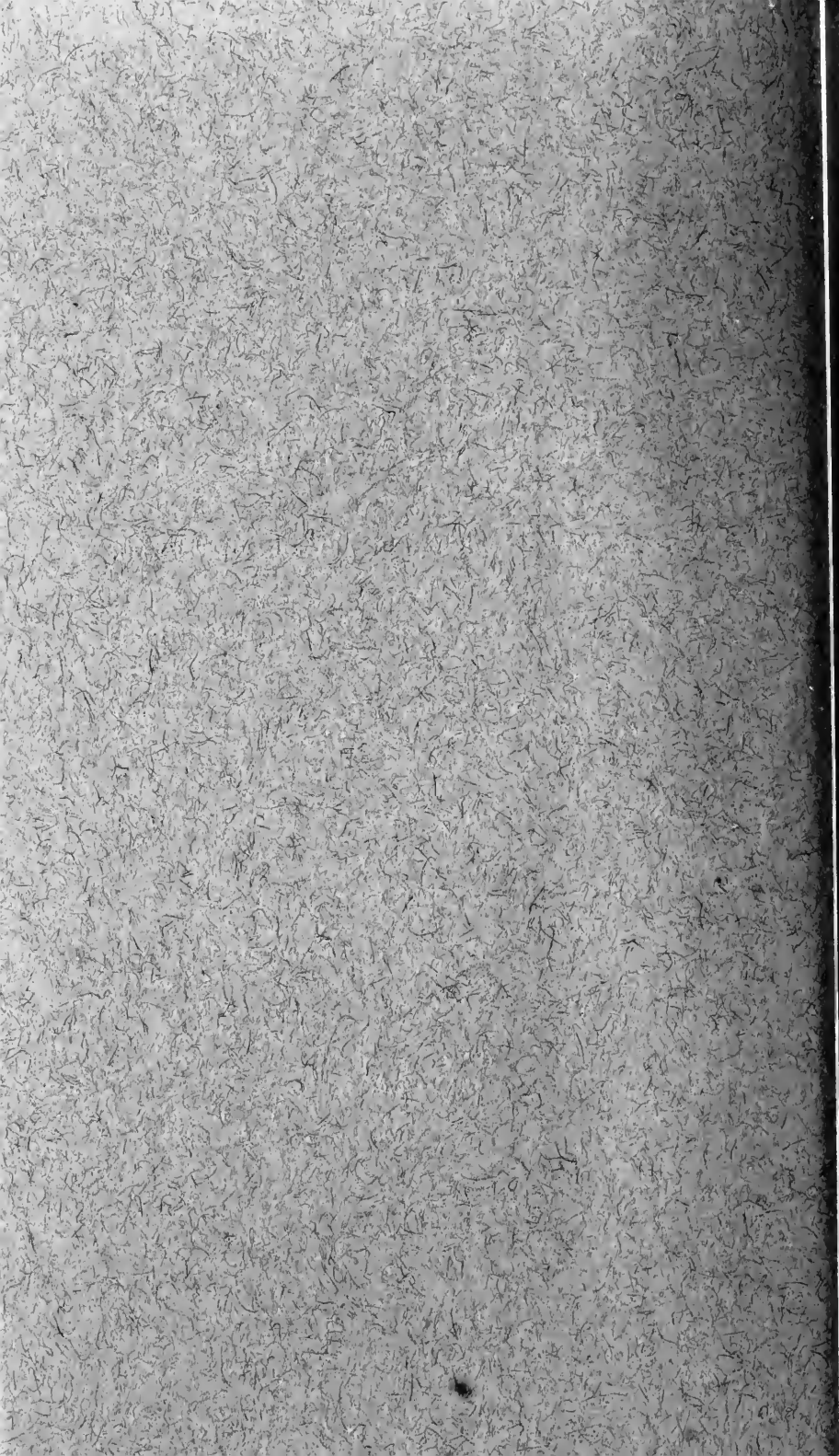
Attorneys,

National Labor Relations Board.

FILED

MAR 23 1959

PAUL P. WOODEN, CLERK



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(Sebastopol Apple Growers)

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 16117

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SEBASTOPOL APPLE GROWERS UNION, RESPONDENT

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This proceeding is before the Court on petition of the National Labor Relations Board for enforcement of its order issued against the respondent on August 27, 1957, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 72 Stat. 945, 29 U.S.C., Secs. 151, *et seq.*),¹ herein called the Act. The Board's decision and order (R. 197-201) are reported in 118 N.L.R.B. 1181. This Court has jurisdiction under Section 10(e) of

¹ The relevant statutory provisions are reprinted in the Appendix, *infra*, pp. 43-45.

the Act, the unfair labor practices having occurred in Sebastopol, California, within this judicial circuit.²

STATEMENT OF THE CASE

I. The Board's findings of fact and conclusions of law ³

In summary, the Board found, upon charges filed by General Truck Drivers, Warehousemen and Helpers Union, Local No. 980, AFL, herein called the Union, that respondent violated Section 8(a)(1) of the Act by interrogating its employees concerning their union sympathies, threatening reprisals against supporters of the Union, promising benefits to employees who refrained from union activity, and requiring applicants for employment to answer questions divulging their union affiliations. The Board also found that respondent violated Section 8(a)(3) and (1) of the Act in connection with the mass layoff of 143 employees and the discharge of 3 employees. The subsidiary facts on which these findings rest are summarized below:

A. Respondent's interference, restraint, and coercion

1. *Background; the Union's organizational campaign*

Late in July 1954 shortly after respondent's 1954 seasonal operations began, Angelo Bertolucci, president of the Union, and Ray Rhodes, its secretary-

² Respondent, a California cooperative corporation engaged in packing, canning, and shipping apples and apple products at its plant at Sebastopol, California, makes substantial interstate purchases and sales; no jurisdictional issue is presented (R. 17-18).

³ The Board adopted the findings and conclusions of the Trial Examiner (R. 198).

treasurer, came to the plant and spoke with respondent's general manager, Elmo Martini (R. 19-20; 213-214; 295-296, 787-788). Rhodes told Martini that quite a few employees had signed union authorization cards, and he requested permission to talk to the employees (R. 20; 215-217, 299, 788). Martini refused permission, and told the Union representatives that they could do what they wanted off the premises (R. 10; 217, 299, 788). Martini agreed, in response to Rhodes' request, to bring the question up before a meeting of respondent's Board of Directors scheduled for that evening (R. 20; 217, 788-789). At this meeting after considerable discussion, Ezra Briggs, one of respondent's directors, suggested that Martini "contact Mr. Jack Rossi * * * an expert on matters of this type to find out what favorable action we could take to discourage the AFL from causing any disturbance among our employees" (R. 20-21, 871-875).

On August 17, 1954, a substantial number of the employees having signed Union authorization cards, the Union filed a petition with the Board requesting an election among respondent's employees. The hearing on this petition took place September 19 and subsequently the election was scheduled for October 19 (R. 36; 417).

A Union meeting was held on the night of October 13 at which Union buttons were distributed among the employees. The next morning a majority of the day shift employees wore the buttons at work (R. 55; 387-388, 455, 576-577, 601-602, 628-629, 649, 653-654).

2. Respondent's unlawful interrogation and threats

a. The activities of Superintendent Beavers

Shortly after respondent's Board of Directors' meeting in July at which the advent of the Union was discussed, respondent's superintendent, Darrel Beavers,⁴ summoned employee Gloria Pate⁵ to his office (R. 23; 698). Beavers told Pate that he wanted to talk to her about the Union's anticipated organizational drive (R. 13; 698-699). He indicated that Pate "was supposed to have had something to do with the Union at Marzana's" (where Pate had previously worked under Beavers' supervision), and "they asked me here if you had anything to do with the Union and I told them no; * * * because I don't want you to lose your job and I know you would lose your job if I had told them yes" (R. 23; 698-699). Beavers told Pate that she might be blackballed if she returned to Marzana because of her union connections there, and he advised Pate not to participate in any organizing activities, because it would "be bad on" him and Pate would be fired (R. 23-24; 699).

b. The activities of Plant Manager Martini

Pate and Lindsay were among the more active adherents of the Union and on the Union committee (R. 26-27; 664, 700-701, 706, 1257-1258).⁶ Early in

⁴ Beavers left respondent's employ several days after this incident; Leonard Duckworth succeeded him as plant superintendent (R. 13; 230, 249, 697).

⁵ Pate testified as Gloria Lee de Font, her married name, but will be referred to herein by her maiden name (R. 26, 134; 697).

⁶ In fact, these two and a third employee were reported to Superintendent Duckworth early in August by supervisor Edna Hardin as "agitators for the Union" (R. 26-27; 1166).

August, Plant Manager Martini stopped at the work station of Pate and Lindsay, and asked them what they thought about the Union (R. 27; 664-665, 669, 702-3). Both girls answered that it was "a pretty good deal" (*ibid.*). Martini then advised them that they did not know what they were getting into, that although they might get more money if the Union got in, they would have to pay out more in dues and initiation fees (R. 27-28; 664-665, 669, 702-3). Late in September, Martini gave Pate and Lindsay a newspaper clipping about certain financial irregularities of a sister local of the Union, and asked them, "Now, what do you think of the Union?" (R. 34; 668-669, 704-705). Martini subsequently warned them that "if the plant would go Union * * * he'd close it down, that he'd lose too much money if it went Union, that he'd closed his plant there in Santa Rosa on account of the Union" (R. 29-31; 667-668, 705, 717).

On September 22, employees Lila Layman and Orice Storey were summoned to Martini's office (R. 37; 322-324, 348-350). Manager Martini talked at some length against the Union, advising Layman and Storey that they should think the matter over carefully before getting involved (R. 37-38; 348-350, 442-445). Martini then forbade Layman from talking about the Union on Company property (R. 38-39; 324, 349, 444).

About the first of October, Martini told a group of women employees, in response to a question by one

⁷ Martini had been employed by R. Taylor Company in Santa Rosa from 1943 to 1952 (R. 30; 945). The plant was unionized, and it closed in 1952 (R. 30; 954-955).

of them as to why "he wouldn't go union," that "he would close the plant down rather than to see it go union, because he couldn't afford to pay union wages" (R. 34-35; 409-410, 412, 413, 445-446).

In early October, Lindsay was working at other than her usual location, and Martini asked her what she was doing there. When Lindsay replied that she was there on relief, Martini said, "Well, what are you trying to do, change them over to the Union?" Lindsay denied this, and Martini said, "I bet you are campaigning for them * * * I ought to put you over with Mr. Storey, you two could have a ball" (R. 64; 670).

On October 15, as shown more fully hereinafter, respondent laid off more than half its employees (R. 68-72; 1120-1230, see pp. 15-18, *infra*). On October 19, the scheduled election took place⁸ (R. 19, 56; 417, 1202-1203). Even after the election, Plant Manager Martini remained interested in the union persuasion of its employees. On the evening of the election Martini met Marie Tripp, who had been laid off on October 15, and sought to ascertain Tripp's attitude toward the Union by asking how the election returns suited her (R. 52-53; 656-657, 927-929).

Late in October, after the layoff and the election,

⁸ The results of this election were inconclusive because of the large number of challenged ballots. The Union received 27 votes, 73 were against the Union, and 111 ballots challenged (R. 1202-1203). Although the representation case was consolidated with the instant proceeding for hearing, it is not in issue now, as the Board granted the joint request of respondent and the Union to withdraw the petition in the representation case (R. 198).

Lila Layman and Mary Russell came to the plant looking for work. Martini informed them that no jobs were then available and added, in substance, that they should have thought it over seriously before getting involved with the Union "deal" (R. 53-55; 414-416, 448-450).

c. The activities of Floorlady Herrerias

Ella Herrerias, the floorlady on the night shift (R. 31; 229-230) also openly campaigned against the Union. In late August or early September, Herrerias threatened a group of employees that any who signed Union pledge cards or "talked union" would immediately lose their jobs (R. 31-32; 407-409). She added that someone from the Company would be at Union meetings, that respondent would learn which employees attended, and that respondent would discharge them (R. 31; 409).

At about the same time, Herrerias cautioned employee Eva Lee, in the presence of a group of women employees who were discussing the Union, "Don't get my girls all excited about the Union because * * * if you do * * * you are going to get blackballed from every job around here" (R. 32; 394-395, 423, 432). Herrerias also threatened the group with layoffs if they did not stop talking about the Union (R. 32; 395-396, 409).

A few days later, early in September, Herrerias warned a group of employees in the women's rest room, "If you girls think I am tough now, wait; if the Union gets in, I'll show you how tough I can be" (R. 32-33; 397).

Early in October, Herrerias told Ernestine Hack and Erma Bate that she was making up a list, and promised that those who would "stick" with her would be assured of a job. Herrerias threatened that employees who did not abandon the Union would be "blackballed," and there would be "some weeding out done" (R. 41-42; 423, 432).

On another occasion in October, Herrerias commented to Hack and Bate that "if the place went union we'd close down" (R. 41; 422-423, 431).

3. Respondent's adoption of a new application form which requires applicants for employment to reveal their union affiliations

In 1954 and earlier years, respondent used a short, one-half page application blank (R. 115; 1297). Before the 1955 season began, it adopted a new form of application blank, covering both sides of a full-size sheet, and containing the following question: "25. To what Trade, Professional or other organizations are you a member: (Do not name any organization which would reveal your race, religion, color, or ancestral origin)" (R. 115-116; 1172, 1205-1206). The concluding paragraph of the blank was as follows: "I understand that, in the event of my employment by the Company, I shall be subject to dismissal if any of the information I have given in this application is false or if I have failed to give any material information herein requested" (R. 1206). The Board concluded that job applicants in the categories employed by respondent would normally interpret question 25 as requiring disclosure of their union affiliation, if any (R. 116-119).

Upon the basis of the conduct described in the foregoing paragraphs the Board concluded that respondent had interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act.

B. Respondent's illegal discrimination against employees

1. *The discharge of Orice Storey on September 22*

Storey, who had worked for respondent in the 1953 season, returned for the 1954 season on July 16 (R. 120; 333). A good worker, she began as an apple sorter, but was soon made a trimmer because of her speed at that work (R. 120; 1170-1171).

In early August, shortly after the Union instituted its organizing drive, Plant Superintendent Duckworth and Night Foreman Charles Williams approached Union President Bertolucci and another individual who were handing out Union authorization cards and literature on the highway at the exit from the parking lot (R. 25; 334-335, 552). As employee Clarence Storey, accompanied by his wife, Orice, and another employee, were leaving the parking lot in their car on this occasion, they stopped at the highway. As they did so Superintendent Duckworth handed Orice Storey two Union application cards and said "As you leave, hit that man with these" (R. 25-26, 335-336, 552. Williams, who accompanied Duckworth, turned to Clarence Storey and said, "Storey, do your country a good deed and run over that guy"; both Duckworth and Williams pointed to the Union representative (R. 25-26; 336, 552-553). Both Storeys ignored these suggestions, signed the

authorization cards, and mailed them to the Union (R. 120; 334-337, 551-552, 1258-1263).

Orice Storey became a member of the Union's day shift organizing committee (R. 120; 339, 1257-1258).⁹ She passed out Union pledge cards at and near the plant in the ensuing weeks, during lunch time and before and after the day shift's hours (R. 120; 337-342). Storey invited supervisor Hardin, day-shift floorlady, to a Union meeting some time in August, but Hardin declined the invitation, saying she would like to come but that if she did there would be too much "yak, yak" (R. 120-121, 342-343, 1169-1170).

On September 22, Union representatives on the highway in a sound truck urged employees over the loud speaker to get a committee together and ask Martini if he would meet with the Union representatives to discuss a consent election (R. 36; 439-440, 344). Lila Layman, Orice Storey, and Mary Russell recruited several other employees and attempted to see Martini (R. 36-37; 440-441, 345). Floorlady Edna Hardin then asked the group of women, who were standing around, why they did not punch in, and they told her they were waiting to see Martini (*ibid*). Hardin then informed Martini that Orice Storey wanted to talk to him. Martini came down to the group of women standing about (between 25 and 75) and, when Storey and Layman asked him to meet with the Union representatives, he said he was unwilling to consent to an election (R. 37; 441-

⁹ There were 22 other members of the day shift organizing committee, and 11 members of the night shift organizing committee (R. 103; 1257-1258).

442, 246, 347). The same afternoon, Martini summoned Layman and Storey to his office and, after cautioning them not to get involved with the Union, directed them to cease "talking union" on respondent's property (*supra*, p. 5).

Two days later, on Saturday, September 25, Orice Storey was discharged (R. 123-126; 238-241). Storey had been ill with a cold on Friday and Saturday, although she worked most of the time those two days (R. 122; 350-352, 1152-1154). About 11 a. m. on Saturday, less than an hour before the day shift ended, Storey informed Hardin that the aspirin she had been taking was not working, and obtained her permission to check out (R. 122; 352, 1154). After opening up the windows on her car, Storey walked back to the cannery to wait while her car cooled off (R. 122; 352-353, 1154). A number of night shift employees who were standing around waiting for their shift to start called Storey over and asked her about a Union meeting set for the following week (R. 122-123; 352-353, 1155). Chicano, one of the inspectors, went up to the balcony outside the superintendent's office and informed Duckworth that Storey "was all the time bothering her about joining" the Union (R. 124; 778-779). Duckworth, after consulting with Plant Manager Martini, went down to find out what Storey was doing and reported back that Storey was ill and had checked out (R. 123-124; 238, 243, 353-355). When Martini ascertained that Storey had actually punched out, he instructed Duckworth to ask her to leave (R. 124-125; 243, 317, 776-778). When Duckworth did so, Storey replied that it was hot outside and that

she was not bothering any one. Duckworth then informed Martini that Storey refused to leave (R. 24; 238, 242-244, 355, 777-782, 316-318). Martini thereupon directed Duckworth to see that Storey left and never came back (R. 124; 243, 317-318). Upon receiving these instructions, Storey went to her car and waited for her husband to complete his shift (R. 125; 355-357).

Martini and Duckworth then called Clarence Storey from his post. Martini, according to Storey, told him that his wife was "trying to form a committee on the night shift. I want you to fire her and get her out" (R. 125-127; 568-570).¹⁰ Storey replied that if Martini wanted to fire her, that was for him to do (R. 125; 569-570). He added that his wife had punched out and was on her own time, and Martini responded, "I forbid talking union on cannery property * * * Why don't they get their — committees and get it over with. * * * You know I am the boss, I am the manager, I run this cannery. Why in the — don't you get Bertolucci and Rhodes to shut the — — place down" (R. 126; 570). Martini warned Storey that the next time he received a complaint about Storey leaving his post he would fire him also (R. 126; 243-244).

Later that day, employees Joanne Schwartz and Eloyce Mounger, while in respondent's office, saw

¹⁰ Although Clarence Storey was a nonsupervisory employee, and therefore not in a position to discharge his wife, the Trial Examiner, upon conflicting evidence, credited Storey's testimony quoted above (R. 127). Apparently what Martini meant was that he wanted Storey to notify his wife that she was fired.

Martini rush in and heard him declare excitedly to one of the men in the office, "That damn Storey woman * * * she's always talking about the union * * * I am going to get rid of her * * * I'd rather see the place closed down than see it go union" (R. 132-133; 615-617, 729-732). About ten minutes later Schwartz asked Floorlady Hardin if Storey had been discharged and if so, why. Hardin replied that she had, and added that respondent could not "have that kind of people around that talk about the union all the time" (*ibid.*).

The following Monday, September 27,¹¹ Orice Storey came back to the plant with Majorie Byrd, and the two women and Clarence Storey went up to Martini (R. 127-128; 574-576, 599-601). Orice Storey asked Martini if she had been discharged, and Martini replied "Yes, Ma'am, you are fired and that's final" (R. 127-128; 360-361, 575-576). When Orice asked if her work had been satisfactory, Martini replied, "Yes, you were a good worker, but I cannot have you talking up this union thing and agitating among the other girls and forming committees. You are fired and that's final and your husband has your check." (*ibid.*)

Rejecting the contention that respondent had discharged Storey for gathering a group of women to talk in a dangerous location (discussed at p. 36, *infra*), the Board concluded that respondent had discharged her because of her Union activities, in violation of Section 8(a)(3) of the Act (R. 133).

¹¹ The Trial Examiner inadvertently stated that this incident occurred October 18 (R. 127).

2. The layoff of October 15

- a. Respondent commences having the Co-op process apples at additional expense

On September 13 in the midst of the Union's organizing drive, respondent began shipping apples to another cannery, the Co-op, for processing (R. 78; 904-905, 1309-1311). Between September 13 and October 15 respondent shipped apples every other day or two to the Co-op, delivering 1,358 tons, in all, during this period (R. 78; 1298-1300, 1309-1311).¹² In all of 1953 it shipped only 155 tons of apples to the Co-op and it sent no apples to the Co-op in 1951 and 1952 (R. 1268).

About a week after respondent began shipping apples to the Co-op, employee Frank Unciano, not a Union member, asked Plant Superintendent Duckworth why respondent was sending apples to the Co-op. Duckworth answered that he was "trying to finish all the apples as fast as they could, because they were afraid the Union was going to get in * * *" (R. 87-88; 515-517). Duckworth added that "he don't want to do business with the unions, he don't want to sign or whatever happens * * *" (R. 88; 517).

Having the apples processed by the Co-op was more costly to respondent than canning the apples at its plant. It had to pay the Co-op \$1.58 for every case of apple sauce canned. In addition, respondent

¹² Earlier that season respondent had shipped 74 tons of apples to the Co-op in order to have it process an order for small cans which it lacked the equipment to handle (R. 78, n. 35.)

had to pay the transportation charges involved in shipping the apples to the Co-op and delivering the finished products back to respondent's warehouses (R. 82-83; 1268).

b. Respondent accelerates its seasonal curtailment of operations, laying off a disproportionate number of Union members

On October 12, shortly before the election, respondent decided to reduce its operations by one shift. According to respondent this decision was due to the fact that its warehouses were filling up and the apples in prospect after October 15 could be handled by one shift (R. 68-79, 73; 1299). The selection of employees to be laid off was made by Superintendent Duckworth, Floorlady Herrerias, and Nightshift Foreman Williams after receiving lists of employees to be retained from other supervisors (R. 68-69; 762-766, 884-886). Ability and seniority were assertedly the determinative factors in selecting employees to be retained (R. 98; 765).

On October 15, respondent called its employees to a meeting¹³ and announced that one shift would have to be laid off because of a shortage of warehouse space and that, insofar as possible, layoffs would be in order of seniority (R. 69-70; 388-392, 617-620, 708, 972-973, 1204). Paul Bondi, chairman of respondent's Board of Directors, informed the employees at this meeting that there was little space left in the warehouse, that

¹³ The meeting was held at the end of the day shift, so that employees of both the day and night shifts could attend (R. 69).

not too many apples were left in cold storage, and that respondent was sorry that it had to lay off one shift (R. 70; 388-392, 654-655, 708, 963-964, 973). Recording secretary McGuire then announced that those who would not be working could turn their caps and aprons in and they would be paid for them (R. 70; 392, 618, 655, 1168). McGuire proceeded to read a list of those who were to be retained in respondent's employ and who were to report to work the following Monday, October 18 (R. 70; 389-390, 618, 655, 708; G. C. Exh. 36).

Before the layoff respondent had 253 employees, of whom 21 had been hired after October 2, the eligibility date for voting in the election. Excluding employees who could not vote in the election, respondent had 232 employees before the layoff (R. 110, 174-179; 1222-1230, 1238-1256). As a result of the layoff, respondent reduced its force of employees eligible to vote from 232 to 108 (R. 70, 104-110; 750-751, 1220-1221). Of the 124 eligible employees selected for layoff, 88, or over 70 percent, were Union supporters. Before the layoff, however, the Union had signed cards from only 107 out of the 232 employees, or a little over 40 percent (R. 105-113; 1258-1263).

The Union's greatest strength was among the women workers on the day shift. It represented 73 out of 86 or almost 85 percent of these women (R. 105-107; 1222-1228, 1258-1263). It was this group which was most affected in the 1954 layoff, 61 of these 86 women being laid off at this time (R. 109; 1220-1228). However, in the 1952 and 1953 layoffs only the night shift employees were affected, although

places for a few of the night shift workers were found on the day shift (R. 96-97; 385-386, 723-728).

Of the 21 new "ineligible" employees 15 had signed Union cards. After the layoff respondent retained in its employ six of these new employees, including five who had not signed Union cards (R. 105, 174-179; 1220-1230, 1258-1263). Twenty-two of the employees whose names were not on the retention list were either retained or rehired in the two-week period following the layoff (R. 111; 294-295, 1255-1256). Of these, while six had signed Union cards, the names of only three of them appeared on a list of Union members furnished respondent by Employee Erma Bate, on October 16, after the layoff, but before any rehiring was done (R. 111; 1209-1221, 1258-1263.¹⁴ Among those rehired was Bate, who supplied respondent with the list of Union members (R. 139; 424-426). In addition to rehiring these employees, who were predominantly nonunion, within the next three weeks, respondent hired 13 employees who had never worked for it before (R. 114, 174-179; 294-295, 1256). Although Martini told a member of the laid-off employees to leave their names, addresses, and telephone numbers, so that respondent could call them if

¹⁴ Erma Bate attended a Union meeting on October 13, and afterward took from the Union's desk a copy of a list of names and addresses of respondent's employees who had signed Union cards (R. 55-56; 419-420, 455-456, 1209-1219). She gave this list to Floorlady Herrerias on October 16 (R. 56-63; 420-421, 483-4, 455-456). Herrerias turned the list over to superintendent Duckworth, who kept it until October 19, the day of the election, and then returned it to Herrerias (R. 56; 457-459, 484-486).

a vacancy arose, they were not called (R. 114; 414-416, 448-450, 655-657).

c. Respondent has knowledge of the identity of Union sympathizers

As related above Herrerias stated, in effect, that respondent would have spies at union meetings. In addition the record shows that various employees reported to management on the activities of the leading Union supporters. As stated above, Chicano informed Superintendent Duckworth that Orice Storey "was all the time bothering her" about joining the Union (R. 124; 778-779). Employee Pauline Ploxa, early in October, discussed the Union activity with Floorlady Herrerias and commented that employee Mary Seidel was a trouble maker, who was "very strong union," and that Herrerias should be careful of her (R. 43-47, 49; 535-536, 1180-1181). The day before the Union meeting on October 13, Ploxa indicated that there was to be a Union meeting the next day, and suggested that Herrerias might be interested in the identity of employees attending (R. 50; 521-1182). On October 14, Herrerias asked Ploxa whom she had seen at the meeting, and Ploxa identified a number of employees (R. 50; 525). One of the employees identified by Ploxa was Clara Davello (R. 44-45, 51; 525). When Ploxa pointed her out to Herrerias, the latter said "Oh, I don't have to worry about her, she hates the Union" (*ibid.*). And as set forth above, employee Erma Bate gave Floorlady Herrerias a list of all the Union members on the day after the layoff.

The comments of respondent's supervisors to various Union adherents also reveal respondent's knowledge of the latter's Union sympathies. As discussed at p. 47, *supra*, Plant Manager Martini frequently spoke to employees, sometimes in a bantering manner, about their Union sympathies. These included employees Pate, Lindsay, Layman, Russell, and Orice and Clarence Storey. On one occasion, for example, he teased Layman and Russell about "going steady" with one of the Union organizers (R. 410-412, 446-447, see also 557-561, 664-667, 701-703). Finally, as stated above, a majority of the day shift employees wore their Union buttons in the plant on October 14, the day before the layoff.

d. The Board's conclusions concerning the October 15 layoff

On the foregoing facts the Board concluded that respondent had accelerated the layoff of one shift for the purpose of affecting the results of the pending election, and that it had selected employees to be laid off on a discriminatory basis, thereby violating Section 8(a) (3) and (1) of the Act (R. 97, 114, 170-171). In reaching this conclusion the Board rejected respondent's contentions that the layoffs were necessary (1) because respondent was running out of warehouse space, and (2) because the volume of apples in prospect was not sufficient to justify the retention of two shifts (see pp. 30-33, *infra*).

3. *The discharge of Gloria Pate on October 18*

Pate began working for respondent on July 15, 1954 (R. 134; 697). She was on the organizing committee

of the Union and was among the more active Union adherents (R. 26-27; 664, 700-701, 706, 1257-1258). As noted above, she was one of those reported by Floorlady Hardin to Superintendent Duckworth as being one of the "agitators for the Union" (R. 26-27; 1166).

Plant Manager Martini also was fully aware of Pate's Union sympathies. On various occasions he approached Pate at her work, asked her about the Union, raised questions as to what the Union could do for her, and suggested that the employees would have to pay out more in dues than the Union could gain for them (R. 27-28, 134; 664-667, 701-705). As stated above, on one occasion Martini threatened Pate that he would close down the plant "if we was to go union" (R. 26-27; 705). As noted also, Superintendent Beavers at the very beginning of Union drive had predicted that Pate would be discharged if she attempted to engage in organizational activities (R. 23; 698-699).

When, on October 15, respondent announced the lay-off and read the list of employees to be retained, Pate's name was included (R. 134-135; 708, 1187, 1220-1221). She reported for work the following Monday, October 18, punched her time card, put on her apron and gloves, and started working, wearing several Union buttons (R. 135; 709-710). After about ten minutes, Foreman Williams asked Pate what she was doing there (*ibid.*). When Pate replied that she was working, Williams advised her that she was not supposed to be there (R. 135; 710-711, 888-889). Pate replied that her name was on the reten-

tion list, whereupon Williams, after checking with the office, informed Pate that he was sorry, but that her name was on the list by mistake and that she would have to leave (R. 135; 709-711). Pate stated that if she went home respondent would have to pay her for reporting to work, and Williams agreed to pay her for two hours work (R. 135-136; 710-711, 890). Respondent subsequently mailed Pate a check for two hours pay (R. 138; 714, 1295).

Before leaving the plant, Pate went to the office to ask Martini why she had been laid off (R. 136-137, 711-712). Martini replied that he did not know, as he had nothing to do with the list, and that respondent was laying off in accordance with seniority (R. 136-137; 712-713, 931-932). When Pate said that employees who had worked for 3 or 4 years had been laid off, Martini replied that only the current year counted (R. 137, 713). When Pate mentioned that she had come to work the first day that year, Martini's only comment was "I don't know, I just don't know" (*ibid.*)

Seven employees were rehired by respondent on October 18, the day Pate was discharged (R. 139-140; 426, 1255). One of these, Erma Bate, had delivered the purloined Union list to Herrerias (*supra*, p. 17). None of the seven had as much seniority as Pate, who began working July 15, 1954; the seven reemployed women began working on July 19 (Bate,), July 20 (Urton), August 9 (Wasin), September 12 (Caddell and Hofland), September 17 (Vessels), and October 4 (Jones) (R. 139-140, 174-179; 426, 1252-1255). And, as stated above, during the next three

weeks respondent hired 13 employees who had never worked for respondent (R. 114, 174-179; 294-295, 1256).

On these facts the Board concluded that in terminating Pate's employment respondent was motivated by a desire to rid itself of one of the more active and outstanding proponents of the Union, and that its conduct was violative of Section 8(a) (3) and (1) of the Act.

4. *The discharge of Dickerson on October 25*

Dickerson was employed by respondent in 1953, and returned to work for the 1954 season July 19 (R. 143; 625). She signed a Union pledge card August 4, attended Union meetings, and, like the others, wore her Union button on October 14 (R. 143; 626). She served as an observer for the Union at the October 19 election, a fact of which respondent was aware (R. 143-144, 154).

On October 25, while Dickerson was working on the trim line, there were very few apples in the flume and work was slack (R. 144; 633-635). She picked up an apple already peeled and cored, put two holes in the apple with her coring knife, placed a core in one of the holes, leaving about one inch protruding, and placed the apple back in the flume (*ibid.*): The apple was removed from the flume further down the line by Inspector Virginia Chicano, the employee who had reported Orice Storey's Union activities to Superintendent Duckworth just prior to Storey's discharge (R. 144; 1118-1119). At quitting time, Herrierias told Dickerson that she had to let her go be-

cause she had inserted the core in the apple and put it back in the flume (R. 145; 482). Dickerson told Herrerias that she had expected to be discharged because she had been picked as an observer for the Union in the election (R. 145; 629-630).

“Decorating” apples, and putting them and other foreign objects into the flume, was a laugh-provoking activity of long standing in the cannery (R. 155-158; 362-371, 382-385, 450-454, 577-583, 682, 688, 690-691, 1143, 1165). No employee had ever been reprimanded for such an occurrence (R. 155; 462, 642, 688, 1165). Respondent had four inspectors on the line whose duty it was to catch apples not suitable for sauce (R. 148; 678, 693). In addition, respondent had a “shaker screen” to remove any seeds and small particles remaining after the apples had been sliced (R. 158; 734-736, 939-943).

Respondent contended that on at least two occasions Dickerson had been observed putting plugged apples into the flume and that on the second occasion Superintendent Duckworth approved Floorlady Herrerias’ recommendation that she be discharged (R. 149; 767). Duckworth defended his decision on the grounds that Dickerson had “sabotaged our product.” Dickerson denied that she had plugged apples on more than one occasion (R. 145; 635-636, 639). Floorlady Herrerias admitted that Dickerson was given no warning against engaging in such conduct (R. 152, 157; 462).

Finding, in accordance with Dickerson’s testimony, that she had plugged an apple on only one occasion, the Board rejected respondent’s contention that she was discharged for repeatedly dropping decorated

apples in the flume, and concluded that Dickerson had been discharged because she was a prominent Union supporter (R. 159).

II. The Board's order

The Board's order requires respondent to cease and desist from engaging in anti-union discrimination, from requiring applicants for employment to answer questions concerning their union membership, and from in any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under the Act (R. 199). Affirmatively, the Board's order requires that the employees laid off or discharged be made whole for their losses as a result of respondent's discrimination against them, and that respondent post appropriate notices (R. 199-200).

ARGUMENT

I. Substantial evidence on the record as a whole supports the Board's finding that respondent interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act

A. Respondent's threats of reprisals, promises of benefits, and interrogation

As shown above (*supra*, pp. 4-9) respondent's supervisory officials engaged in numerous and widespread acts of interference, restraint, and coercion designed to interfere with the employees' rights under Section 7. This conduct included interrogating its employees concerning their union sympathies, threatening to close its plant if the Union succeeded in its attempt to become the employees' statutory bargaining representative, threatening employees with

discharge if they had anything to do with the Union, telling employees they would be blackballed if they supported the Union, threatening to “get tough” if the Union won the pending election, prohibiting certain employees from union discussion on respondent’s property, and promising benefits to employees who refrained from union activity. That such conduct constitutes interference, restraint, and coercion in violation of Section 8(a)(1) of the Act is too well settled to require citation of authority.

Respondent’s principal contention before the Board with respect to this, as well as to other phases of the case, was that the Trial Examiner erred in his resolution of the conflicting testimony. As this Court has said, “the oft-repeated rule [is] that questions of credibility are for the trial examiner who has the opportunity to observe the demeanor of the witnesses.” *N.L.R.B. v. West Coast Casket Co.*, 205 F. 2d 902, 906. It is manifest from the Trial Examiner’s detailed resolutions of conflicts in testimony in the intermediate report that the Trial Examiner carefully considered the evidence in this case. The Board on its separate appraisal of the record having adopted the Trial Examiner’s report, “‘a court may [not] displace the Board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo’” (*West Coast Casket case, supra*, 205 F. 2d at 907, quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488).

B. Respondent's use of a new employment application form requiring the disclosure of union membership

Beginning in the spring of 1955, respondent admittedly changed the form of its application blank. The new form, given to all applicants for rank and file jobs, contained the question "To what Trade, Professional or other organizations are you a member: (Do not name any organization which would reveal your race, religion, color, or ancestral origin)" (*supra*, pp. 8-9). In view of the concluding paragraph of the form which indicated that a failure to make a true or full disclosure of all the facts would subject an employee to discharge, the Board could reasonably find, as it did, that applicants for the kind of jobs respondent had to offer would interpret the form as requiring the disclosure of union affiliation (R. 116). This conclusion appears all the more sound in light of the fact that as the board noted (*ibid.*), applicants for jobs as apple peelers or apple dumpers were unlikely to have any "trade" or "professional" organizations other than labor organizations in which to report membership. In these circumstances, and bearing in mind the background of hostility to unions against which respondent's adoption of the new form must be viewed, we submit that the Board had ample warrant for its holding that respondent's use of the new application blank constituted interference, restraint, and coercion prohibited by Section 8(a)(1) of the Act.

While, as the Board recognized (R. 117), the use of an application form such as respondent adopted may not, standing alone, be *per se* interference, restraint or coercion (*N.L.R.B. v. Ozark Dam Constructors*, 190

F. 2d 222, 227 (C.A. 8); *Wayside Press, Inc. v. N.L.R.B.*, 206 F. 2d 862, 864 (C.A. 9)), the use of such forms in a context of intensive hostility to unions, such as has been demonstrated in this case, is a violation of the Act. In such circumstances, as the Court of Appeals for the Sixth Circuit has held, "the use of such forms is a type of interrogation which is no less violative of the Act than oral interrogation concerning union membership and activities; *Texarkana Bus Co. Inc. v. N.L.R.B.*, 8 Cir., 119 F. 2d 480 * * *." *N.L.R.B. v. F. H. McGraw & Co.*, 206 F. 2d 635 (C.A. 6). The Board's conclusion that the use of the new forms is violative of Section 8(a)(1) of the Act is consistent with this Court's decision in the *Wayside* case. There, the Court, in holding that the use of such forms, standing alone, did not constitute a violation of the Act, stressed the absence of any background of union hostility. Here, in marked contrast, respondent adopted the new forms after engaging in intensive antiunion activities and, indeed, for the very purpose of further effectuating its opposition to the Union.

II. Substantial evidence on the record considered as a whole supports the Board's conclusion that respondent accelerated its seasonal layoff and selected employees for inclusion therein for anti-union reasons, thereby violating Section 8(a) (3) and (1) of the Act

As shown above, *supra*, pp. 14-18, after having openly opposed the Union's organizing drive for over a month and threatened numerous employees with reprisal on account of the Union, including threats of discharge, blacklisting, and closing the plant, respondent suddenly commenced shipping apples to the Co-op for

processing. In the month preceding the Board election respondent shipped over 1300 tons of apples to the Co-op as contrasted with 155 tons in all of 1953. Plant Manager Martini explained to an employee (not a Union member) that respondent "was trying to finish the apples as fast as they could because they were afraid the Union was going to get in" (*supra*, 14).

On October 15, just four days before the election, respondent suddenly laid off over half of its employees with the explanation that respondent had insufficient apples to warrant the retention of two shifts. The Board found that respondent accelerated the seasonal layoff in order to defeat the Union in the election and that in selecting employees for layoff respondent was motivated by anti-union considerations. We submit that these findings are supported by the record and in accord with settled judicial authority.

Respondent's knowledge of the identity of Union supporters appears not only from Herrerias' statement that respondent would have spies at the Union meeting, but also from the many comments of Plant Manager Martini to various Union adherents concerning their Union activities (*supra*, pp. 4-7). In view of this knowledge, the disproportionate number of Union members selected for layoff, is persuasive evidence that respondent's actions were motivated by anti-union considerations. As stated above, of the 124 employees eligible to vote in the election who were laid off, 88, or over 70 percent, were Union support-

ers, whereas only a little over 40 percent of the employees as a whole had signed Union cards (*supra*, p. 16). Of the 21 ineligible employees, 15 had signed Union cards. Only one of these was retained as compared with 5 of the nonunion employees retained (*supra*, p. 17). The layoff bore most heavily on the day shift women, who were the most highly organized group among respondent's employees. Seventy-three of the 86 women on this shift (85 percent) were Union members. Sixty-one (70 percent) of the day shift women were included in the layoff. However, in previous years the day shift had scarcely been touched in the seasonal curtailment, the reductions-in-force on these occasions being confined to night shift employees (*supra*, p. 16-17).

Union members received the same disparate treatment in rehiring after the layoffs. Of the 22 employees whose names were not on the retention list but who were either retained or rehired shortly after the layoff, the names of only three appeared on the purloined list of Union members given respondent (*supra*, p. 17). And respondent also hired 13 new employees without recalling any of the other laid off employees, despite promises to do so (*supra*, p. 17).

The courts have uniformly held that "disproportionate treatment of union and non-union workers may be very persuasive evidence of discrimination * * * and may create an inference of discrimination leaving it to an employer to give an adequate explanation of the discharge or layoff * * *." *N.L.R.B. v. Chicago Steel Foundry Co.*, 142 F. 2d 306, 308

(C.A. 7); see also *N.L.R.B. v. Holtville Ice & Cold Storage Co.*, 148 F. 2d 168, 170 (C.A. 9); *North Whit-tier Heights Citrus Association v. N.L.R.B.*, 109 F. 2d 76, 78-79 (C.A. 9), certiorari denied, 310 U.S. 632; *N.L.R.B. v. Shedd-Brown Mfg. Co.*, 213 F. 2d 163, 174 (C.A. 7); *N.L.R.B. v. W. C. Nabors d/b/a W. C. Nabors Company*, 196 F. 2d 272, 275 (C.A. 5), certiorari denied, 344 U.S. 865; *N.L.R.B. v. Sifers Candy Co.*, 171 F. 2d 63, 66, (C.A. 10)

Respondent failed to substantiate its contention that ability and seniority were the determinative factors in selecting employees for layoff. Respondent had no production records and did not offer any evidence indicating that the ability of those retained was in fact superior to that of the employees laid off. As to seniority, the record shows that this factor was disregarded in many instances; viz, the hiring of persons who had never worked for respondent immediately after the layoff, and the retention of a number of employees who had been hired so late in the season that they were not eligible to vote in the representation election, as against the layoff of long service employees, such as Gloria Pate.

Respondent sought to explain the acceleration of the layoff on the grounds that the apples in prospect were insufficient to keep two shifts going and that the warehouse space for its finished products was becoming inadequate. Since the meager supply of apples on hand and in prospect was due entirely to the fact that respondent had been shipping apples to the Co-op for over a month, the basic question on this phase of the case is whether the Board was justified in finding

that respondent shipped the apples to the Co-op to enable it to get rid of Union supporters in advance of the election. In so finding, the Board rejected respondent's contention that the large quantity and poor quality of the apples on hand necessitated having them processed by the Co-op. Various considerations support the Board's findings in this regard.

The record does not bear out respondent's claim that spoilage amounted to 700 tons of apples. On the contrary, records produced at the hearing established that respondent succeeded in disposing of the entire 16,700 tons of fruit received during the 1954 season (R. 79, n. 36; 1305). By the time respondent commenced shipping apples to the Co-op respondent had had an opportunity to process most of the overflow from the peak of the Gravenstein season which had been reached two or three weeks earlier (R. 76-77, 82-91). Even if respondent had not entirely finished processing the Gravensteins by September 13, it would have at least finished them by the latter part of September according to the estimate of Winkler, vice chairman of respondent's Board of Directors (R. 77, 79-80, 90). But respondent continued to ship apples to the Co-op until October 14 (*supra*, p. 14). It even continued to send apples to the Co-op between October 12 and 15, after it decided that a curtailment of operations was going to be necessary (*supra*, p. 14).

The incurring of this additional expense, which could have been avoided simply by having its night shift work a few days longer, can rationally be explained only on the theory that respondent was determined to have a basis for effecting a reduction in

force before the election. As stated above, the election was scheduled for Tuesday, October 19. The layoff was effected on Friday, October 15. Had respondent deferred the layoff for as little as two working days longer, the layoff would have been postponed until after the election. In view of respondent's manifest hostility to the Union, the Board could reasonably infer, as it did, that respondent's real reason for incurring this unnecessary added expense was its determination to hasten the completion of the processing of the apples so as to be able to effect a substantial layoff of Union members before the election.

With regard to respondent's claim that a shortage of warehouse space also contributed to the layoff, respondent brought this situation on itself by its diversion of apples to the Co-op in pursuance of its illegal objective discussed above. Since respondent reasonably could have foreseen that processing the apples in three shifts (counting the apples handled by the Co-op as one shift) would result in a much more rapid accumulation of finished products, respondent cannot rely on the consequences of this action, taken in pursuance of its illegal objective, as justification for the accelerated layoff.

Furthermore, the record refutes respondent's claim of a shortage of warehouse space on October 15. Early in the 1954 season respondent completed and put into use a new, insulated warehouse with a capacity of 180,000 cases (R. 92; 842, 950). Respondent's old warehouse had a capacity of 114,000 cases (R. 91; 843, 1193). In addition to its old warehouse, respondent had previously used two

porches and a large cold storage room for storage purposes (R. 92; 949, 1195-1198). The latter, after being dried out with a heater, served as an insulated storage space for almost 140,000 cases (R. 92, 1196). The porches had a capacity of about 76,000 cases (R. 92; 1198). Thus, even without the new warehouse, respondent could store 330,000 cases of canned goods. Adding to this the capacity of the new warehouse, 180,000 cases, respondent could store 510,000 cases without shipping out a single case. Respondent's production for the 1954 season was approximately 495,000 cases (R. 93; 1264). Its carry over from the previous season amounted to about 40,000 cases more (R. 93, n. 44; 1267). However, by October 15 it had shipped out over 145,000 cases (R. 93; 1264). It is apparent from the foregoing that respondent had ample storage space on October 15, without using the porches at all. In view of the facts set forth above we submit that the Board was fully justified in rejecting respondent's contention that a lack of adequate storage space was one of the reasons for the acceleration of the seasonal layoff in 1954.

On the facts summarized above the Board was fully warranted in concluding that antiunion considerations motivated both the acceleration of the seasonal layoff and the selection of employees to be included in the layoff. As noted above, respondent's diversion of apples to the Co-op can be explained only on the basis that it enabled respondent to effect a substantial layoff of Union members in advance of the election. Respondent's entire conduct since the advent

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of the Union—its threats of reprisals against Union supporters and the discriminatory discharge of Orice Storey, the Union's most outspoken advocate—is consistent only with a determination to thwart the Union's organizing drive. The statement of Superintendent Duckworth to Employee Unciano that respondent was sending apples to the Co-op because it was "afraid the Union was going to get in" fully confirms the Board's conclusion that respondent's underlying objective in this maneuver was to defeat the Union in the election. Accordingly, the Board properly found that respondent's conduct in connection with the layoff was discriminatory and violative of section 8(a)(1) of the Act.

III. Substantial evidence on the record considered as a whole supports the Board's finding that respondent discriminatorily discharged Employees Storey, Pate, and Dickerson, in violation of Section 8(a) (3) and (1) of the Act

A. Orice Storey

As shown above (*supra*, pp. 9-10) Orice Storey had been employed by respondent for two seasons and was an excellent worker. Storey had been brought inside to be a trimmer because she was fast at sorting apples.

Storey was one of the most aggressive and outspoken of the Union adherents in respondent's plant, a fact well known to respondent's manager, Martini, and superintendent, Duckworth. As stated above, Storey had been the spokesman for the Union representatives when they sought to confer with respondent on September 22 about an agreement for a consent election. On this occasion Storey had been warned

about becoming involved with the Union, and instructed to cease talking about the Union on Company property.

Three days later, on September 25, Storey was abruptly discharged under circumstances which are indicative of respondent's true motivation. Feeling ill on this occasion, Storey had been excused from work, and had returned to the plant to wait while her car cooled off. She was engaged in a conversation about the Union by a group of employees waiting to go to work on the night shift, which commenced at noon on Saturdays. This was reported to the office by one of the Inspectors. Superintendent Duckworth requested her to leave but she protested that it was hot outside. Thereupon Duckworth consulted with Plant Manager Martini, who authorized her discharge forthwith. Immediately thereafter, Plant Manager Martini told Storey's husband she was trying to form a Union committee on the night shift, and that he wanted Storey to notify his wife that she was fired. On the very day of her discharge two employees, Mounger and Schwartz, overheard Martini say, "That damn Storey woman * * * she's always talking about the Union * * * I am going to get rid of her * * * I'd rather see the place closed down than see it go union." Two days later, Martini told Orice Storey and Majorie Byrd, in response to Storey's query whether she had been discharged, that he could not have her "talking up this union thing and agitating among the other girls and forming committees."

Respondent claimed at one point that Storey was discharged for calling together a group of women in the plant, and at another that she was discharged for gathering the group in a location that was dangerous because a fork lift was operating there. Respondent's actions on that occasion, however, belie its asserted reasons. In the first place, were the women in the group in any physical danger from the fork lift, Martini surely would have told the entire group to leave the area, yet only Storey was told to go. Second, if standing in a dangerous place had been the real reason for Storey's discharge, "it is extremely unlikely that * * * [Martini or Duckworth] would have suppressed it." *N.L.R.B. v. Smith Victory Corporation*, 190 F. 2d 56, 57 (C.A. 2). Even less convincing as an explanation for Storey's discharge is respondent's alleged rule against employees standing near the time clock before going to work on the night shift. The group of women were not there at Storey's behest, but were standing around when she approached. Further, it was not even suggested to any of the other women that they should not have been standing there. Finally, the evidence shows that if there was such a rule, it was never enforced, and that women normally stood around in that area while waiting to go on shift.

On the foregoing facts the Board was fully justified in rejecting respondent's explanation for the discharge and in concluding that Orice Storey was discharged because of her strong support of the Union.

B. Gloria Pate

As stated above (*supra*, pp. 19-20), Pate had signed a Union card on August 4, and she was on the Union's day shift committee. At the very beginning of the organizing drive Superintendent Beavers had warned that she would be discharged if she became involved with the Union and would be "blackballed" by other employers in the area. Manager Martini also was fully aware of Pate's prominence in the Union. Early in August, he had interrogated her about her union activities and sympathies. In September, shortly before her discharge, he had asked her to show a newspaper clipping reflecting adversely upon another local of the Union to Union officials and let him know what they had to say about it. Pate, like Orice Storey, had been reported to Superintendent Duckworth as a "union agitator."

Pate's name was on the retention list, and accordingly she reported for work the workday following the layoff. After 10 minutes she was told by Foreman Williams that she was not supposed to be there and would have to leave. Respondent later sent her a check for two hours pay for reporting to work that day.

Respondent defends its discharge of Pate on the ground that Pate's name was not on the retention list, and was, accordingly, not read at the October 15 meeting. However, Pate testified that she heard her name read; Mary Castino corroborated Pate, testifying that she too heard Pate's name read; and the

retention list furnished the General Counsel by respondent (R. 1220-1221) includes Pate's name. The Trial Examiner credited Pate and Castino as against respondent's witnesses, and concluded that the retention list earlier furnished the General Counsel by the respondent was more accurate than the one proffered by respondent at the hearing (R. 70-72).¹⁵ That Pate would report for work the following Monday, if her name had not been read, is unlikely. Moreover, if respondent had not read Pate's name on October 15, it most likely would not have given her two hours' pay for reporting on October 18.

It is especially revealing that on October 18, and for the next few days, respondent was in need of employees. As detailed above, during that period it hired a number of new employees, and recalled seven employees who were junior to Pate, despite respondent's assertion that seniority was a factor in determining which employees to retain.¹⁶

These factors amply support the Board's conclusion that Pate was discharged by respondent because she was one "of the more active and outspoken proponents of the Union" (R. 143). It appears that

¹⁵ The Trial Examiner based his finding that the list introduced into evidence by the General Counsel was more accurate than that introduced by respondent on the fact that the General Counsel's list more closely reflected what actually occurred. His reasoning appears at pp. 70-72 of the Record.

¹⁶ Although respondent also claimed that ability was considered first, the number of new employees hired effectively rebuts any possible claim that Pate was discharged because more qualified employees were being retained. Nor did respondent adduce any evidence indicating that Pate's work had been poor, or even not as good, as any of the rehired employees.

respondent inadvertently included Pate's name on the retention list and acted promptly to remedy its oversight as soon as the error came to its attention. Under the circumstances, the Board validly concluded that respondent had discriminated against Pate in violation of Section 8(a) (3) and (1) of the Act.

C. Elsie Dickerson

As related above (*supra*, pp. 22), Elsie Dickerson's name was on the list of Union members taken By Erma Bate and turned over to Superintendent Duckworth after the October 15 layoff. She had acted as an observer for the Union in the election on October 19, a fact of which respondent was well aware.

On October 25, after having dropped a "decorated" apple in the flume, Dickerson was discharged. At the time of the discharge, Floorlady Herrerias informed her that she was being fired because she had been putting plugged apples in the flume. At the hearing, however, respondent took the position that she had "sabotaged" the product. The record clearly establishes that although instances of such "horseplay" were fairly common, respondent had never before taken a serious view of such conduct. The record is replete with instances of employees "fooling around" with apples coming along the flume; yet no employee was ever discharged, disciplined, or even warned, on account of such activity. Dickerson herself was discharged without warning, and for an alleged offense that was not only tolerated by respondent on all earlier occasions by other employees, but had been the

occasion of laughing and appreciative comments by supervisors in similar instances (R. 155-158; 362-371, 382-385, 450-454, 577-583, 682, 688, 690-691, 1143, 1165). Despite respondent's contention to the contrary, there was no real difference in substance between Dickerson's conduct and the decorating of apples which respondent had condoned in the past. While each new form of decorating an apple invented by a playful employee would differ from earlier attempts, there was little danger of seeds and particles of cores finding their way into the finished product. Respondent, as noted above, had inspectors whose function it was to remove foreign materials, and it had a screen to catch any small particles which escaped the notice of the four inspectors. Under all the circumstances it is difficult to believe that respondent actually thought that Dickerson was "sabotaging" the product.

Respondent's desire to rid itself of Union adherents has already been amply demonstrated. Beginning with the first attempt by the Union to organize its employees, respondent had countered by systematically threatening employees, interrogating them, lecturing them on the disadvantages of being unionized, and promising them benefits if they withdrew from the Union. On September 25, respondent discriminatorily discharged Orice Storey (*supra*, pp. 34-37). On October 15, respondent laid off more than half its employees in order to defeat the Union (*supra*, pp. 27-34). Respondent's antipathy toward the Union did not, of course, suddenly disappear after the layoff and the election. As the election was not conclusive, respondent was not yet, from its standpoint, in a secure

position. The disparity in the number of Union members retained on October 15 was repeated after October 18, as a grossly disproportionate number of the rehired employees were not Union members. These facts emphasize that respondent was still influenced by its Union animus after October 19.

Viewing the circumstances of Dickerson's discharge in light of respondent's well-established animus against the Union, the Board reasonably concluded that respondent seized upon the incident of "plugging" the apple on October 25 as a pretext for ridding itself of another employee thought by respondent to be one of the Union leaders. Accordingly, the Board validly concluded that Dickerson's discharge was discriminatory and violative of Section 8(a)(3) of the Act.¹⁷

¹⁷ After the hearing respondent and the charging Union apparently reached a mutually acceptable settlement of their differences, and jointly moved the Board to dismiss the proceeding. Under settled law the granting or denial of such a motion rests in the Board's discretion, for the Board acts as a public agency safeguarding the public interest and not to further the interest of a private litigant. Section 10(a), *infra*, pp. 43-44; *N.L.R.B. v. E. A. Laboratories*, 188 F. 2d 885, 887 (C.A. 2), certiorari denied, 342 U.S. 871; *N.L.R.B. v. Federal Engineering Co.*, 153 F. 2d 233, 234 (C.A. 6), and cases there cited.

The refusal of the Board to dismiss the instant case cannot prejudice respondent unless respondent has failed to remedy, or again commits, unfair labor practices. To the extent that respondent has already complied with the Board's order, respondent need not repeat its compliance, and to the extent that economic conditions render compliance impossible respondent will not be in contempt for failure to comply. However, to the extent, if any, that the settlement agreement leaves unremedied unfair labor practices as to which the Board's order provides a practicable remedy, the Board's insistence on its remedy, and its refusal to accept the private settlement, is manifestly in the public interest.

CONCLUSION

For the reasons stated it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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MARCH 1959.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 72 Stat. 945, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the

opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

* * * * *

No. 16,117

In the

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SEBASTOPOL APPLE GROWERS UNION,
Respondent.

**Brief for Respondent and Request for Prehearing
Conference Under Rule 35 (11)**

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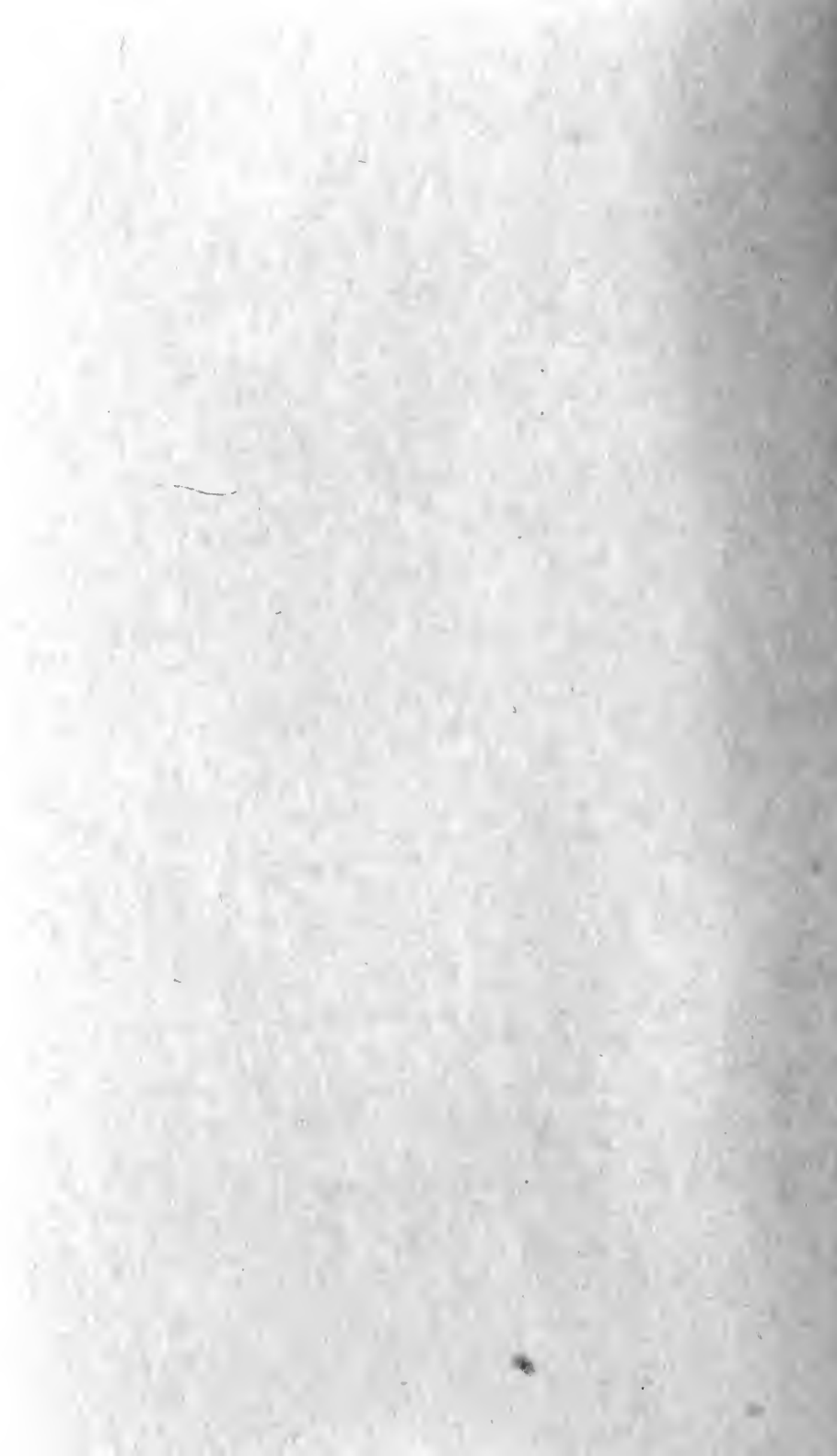
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MAY - 7 1959

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No. 16117

In the

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,	}
<i>Petitioner,</i>	

v.

SEBASTOPOL APPLE GROWERS UNION,	}
<i>Respondent.</i>	

Brief for Respondent and Request for Prehearing Conference Under Rule 35 (11)

INTRODUCTION

In 1954 the Teamsters were trying to organize the employees of respondent Sebastopol Apple Growers Union, a cooperative which packs, cans and ships apples and apple products (R. 17). Respondent is known as SAGU for short, and we will sometimes use that abbreviation in this brief. The events giving rise to this action took place in the fall of that year.

In the summer and fall of 1955 hearings were held before a Trial Examiner of the Board (R. 17). By the time he issued his report in March 1956 (R. 173), the union and respondent had settled their dispute and reached a fair agreement. They joined in a request to withdraw the charge

(R. 185-189). The Board denied the request summarily (R. 189-190): the matter was not dropped.

More time passed. In August 1957, almost a year and a half after the Trial Examiner's report, the Board adopted his findings, conclusions and recommendations, again without analysis or discussion (R. 198). Finally, another year later, the Board petitioned for enforcement (R. 206-208).

Now, almost five years after the events in question, almost four years since the matter came before the Board, and over three years since it has been settled by the parties, this Court is given the task of reviewing the 1300-plus-page record to determine whether the Board's order is supported by substantial evidence. We shall endeavor to be as helpful as possible to the Court in this task.

The mills of the Board grind slowly; how fine they grind remains to be seen.

One question may occur to the Court at the outset: if the respondent and the union have settled this matter, why should respondent object to the Board's order? Primarily because it calls for back pay for 146 people (R. 200, 181-183), none of whom, as we will show, were discriminatorily discharged and many of whom were not discharged at all. Furthermore, respondent does not want to be put into a position of acknowledging unfair labor practices which it did not commit.

The real question is why the Board did not dismiss the matter after the settlement had been reached in 1956. This is one of the principal issues which we will discuss, and we will show that the Board's refusal was unreasonable, arbitrary and in violation of the Labor Management Relations Act.

ISSUES PRESENTED

We will first discuss the question just referred to pertaining to the Board's refusal to dismiss the case after it

had been settled and show that the Board's conduct does not rest on any factual or rational foundation (*infra* I). While the Board touches lightly on this issue only at the end of its brief (Board Brief 41, note 17), examination of the question at the outset may be helpful for, if the Board abused its discretion—and we submit it did—if, in other words, the Board should have terminated these proceedings three years ago, then this disposes of the case without the necessity of resolving the remaining issues.

But we shall deal with the remaining issues as well in order to make clear that the Board's findings and conclusions are not supported by substantial evidence. The first of these other issues is the relatively simple one of whether the Board's conclusion that respondent's employment application form violates section 8(a)(1) is supported by the record. We will show that it clearly is not (*infra* II).

Next we will turn to the question of whether the lay-off of October 15, 1954 was discriminatory (*infra* III). We will see that far from being based on substantial evidence, the Board's conclusions run counter to it and cannot be sustained when the record is viewed in its entirety. Specifically we will see that the Board's conclusion respondent deliberately shipped out apples to another cannery in order to create a shortage by which to justify the lay-off is completely lacking in evidentiary and legal support, as are its conclusions that respondent had ample warehouse space and the lay-off was carried out discriminatorily.

We will then discuss the question of whether the Board mistakenly included a number of employees as being affected by the lay-off, even if we assume *arguendo* that it was discriminatory (*infra* IV). We will see that indeed a large number of employees was so included, among them many who were not laid off at all or who had been hired after the date

determining eligibility to vote in the election or who were concededly not union supporters.

Finally, we will discuss the three individual discharges and show that there is no substantial evidence for holding them to have been motivated by anti-union sentiments (*infra* V).

Questions pertaining to the lay-off and the discharges can be analyzed intelligently only by reviewing the extensive record; we regret that for that reason and because of the Board's intransigent position and sketchy presentation, this brief, too, will be extensive. We trust it will be helpful to the Court.

Due to the complexity of the issues we respectfully suggest that a prehearing conference in accordance with Rule 35(11) of this Court may be beneficial "to consider the simplification of the issues." Respondent would be happy to cooperate fully toward the end of such simplification.

Argument

I.

THE BOARD ARBITRARILY REFUSED TO GIVE EFFECT TO THE SETTLEMENT OF THE PARTIES

Three years ago, in March 1956, the charging union and respondent settled their dispute. They moved for permission to withdraw the charge or to dismiss the complaint (R. 185-188).

Pursuant to the settlement respondent recognized the union as the collective bargaining agent of its employees (R. 186) and agreed to place the employees who were allegedly discriminatorily discharged on a preferential hiring list (*ibid*). The union agreed to obtain waivers of back pay from the alleged discriminatees (R. 187).

Without a hearing, the Board summarily denied the motion; it refused permission to withdraw the charge and

refused to dismiss (R. 189-190). The Board did not discuss the matter other than to state the conclusion that "it does not appear that it will effectuate the policies of the Act to close the case on the basis outlined in the motion." (R. 190). The summary denial was made before the moving parties even had an opportunity to answer the General Counsel's opposition to the motion (R. 190, 195-196), although the Board was certainly in no hurry—it did not issue its decision on the merits until almost a year and a half later (R. 197-201),¹ and then again only summarily, without discussing the facts.²

Had the Board given reasonable effect to the settlement, this matter would have been disposed of long ago. Instead it is now before this Court almost five years since the events in question and more than three years since the parties reached a settlement, carried it out in good faith and established a continuing healthy collective bargaining relation.

The question to be decided is whether the Board acted arbitrarily in peremptorily denying the motion for permission to withdraw the charge or to dismiss. We shall show that it did.

(1) The motion was made on March 9, 1956 and denied on April 11 (R. 188, 190). Except for this instance, the Board's processing of this case was leisurely: October 1955: hearings before trial examiner conclude (R. 17). March 1956: intermediate report of trial examiner (R. 173). August 1957: Board decision adopting trial examiner's findings and recommendations (R. 201). July 1958: Petition for enforcement (R. 208).

(2) For a recent decision where the court refused to enforce such a "per curiam" Board order, see *Osceola Co. Co-Op. Cream. Ass'n v. NLRB* (8th Cir. 1958), 251 F.2d 62. Compare *State Corp. Com'n. of Kansas v. Federal Power Com'n.* (8th Cir. 1953), 206 F.2d 690, 723, cert. denied 346 U.S. 922: "A mere assertion that the Commission has examined 'all of the available evidence of record on this subject' does not suffice to show this court, on review, that the conclusion of the Commission as to the rate of return is the result of the application of the Commission's expertise and judgment so that we would affirm."

Preliminarily, we note that the Board has wide discretion in determining whether it would accord with the policies of the Act to give effect to a settlement between the parties and to grant their request for dismissal.³ But, of course, the Board's discretion is not unlimited. Courts will set aside exercises of discretion that are arbitrary, unreasonable or capricious.⁴ And they will do so more readily where, as here, the facts pertaining to the settlement are undisputed, and the Board's conclusion is one of law.⁵

(3) 29 USCA § 160(a); *NLRB v. E. A. Laboratories* (2nd Cir. 1951), 188 F.2d 885, 887; *NLRB v. Federal Engineering Co.* (6th Cir. 1946), 153 F.2d 233; *NLRB v. Prettyman* (6th Cir. 1941), 117 F.2d 786.

(4) Courts sometimes state this negatively by saying that a Board determination as to which it has discretion will not be set aside unless it is arbitrary, unreasonable or capricious. E.g., *NLRB v. Grace Co.* (8th Cir. 1950), 184 F.2d 126, 129; *Mueller Brass Co. v. NLRB* (D.C. Cir. 1950), 180 F.2d 402, 404; *NLRB v. Continental Oil Co.* (10th Cir. 1950), 179 F.2d 552, 554; *NLRB v. Minnesota Mining & Mfg. Co.* (8th Cir. 1950), 179 F.2d 323, 326; *Valley Mould & Iron Corp. v. NLRB* (7th Cir. 1941), 116 F.2d 760, 764; *Marlin-Rockwell Corp. v. NLRB* (2nd Cir. 1941), 116 F.2d 586, 587.

The Administrative Procedure Act, 5 USCA § 1009 (e), provides that the reviewing court "shall * * * set aside agency actions, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; * * *"

In *NLRB v. Prettyman*, note 3 *supra*, dealing with a settlement, the court said (117 F.2d at 792, emphasis supplied): "No evidence appears as to the terms of the settlement. *Under the facts here*, there is no abuse of the Board's discretion." In the present case the terms of the settlement appear in the record (R. 186-187) and the Board did not deign to comment on them (R. 189-190).

(5) E.g. *E. Anthony & Sons v. NLRB* (D.C. Cir. 1947), 163 F.2d 22; *NLRB v. Bell Oil & Gas Co.* (5th Cir. 1938), 98 F.2d 870; 5 USCA § 1009 (e); Jaffe, *Judicial Review: Question of Law* (1955), 69 Harv. Law Rev. 239: "The distinction between fact and law is vital to a correct appreciation of the respective roles of the administrative and the judiciary. The administrative is the sole fact finder. The judiciary may set aside a finding of fact not adequately supported by the record, but, with certain exceptions, at that point its function is exhausted. It has, as it were, a veto but no positive power of determination. On the other hand, the administrative and the judiciary *share* the role of law pronouncing and law making. They are in partnership. The court may supersede the

As we have seen the Board summarily denied the motion "because it does not appear that it will effectuate the purposes of the Act." (R. 190). To ascertain whether this brusque conclusion is arbitrary, we turn briefly to the purposes of the Act.

They are basically to promote the peaceful settlement of labor disputes and to prevent the disturbance of interstate commerce by them. As this Court said not long ago in *NLRB v. Knickerbocker Plastic Co.* (9th Cir. 1955), 218 F.2d 917, 924:

"* * * when it is considered that the fundamental purpose of the labor Act was and is to prevent disturbance of interstate commerce by labor disputes, through employer-employee agreements arrived at by employer and employees' bargaining agent, it would seem that enforcement of the board's order should be approached with care lest the purposes of the act be hindered rather than effectuated."

In *NLRB v. Fansteel Metallurgical Corp.* (1939), 306 U.S. 240, 258, 59 S.Ct. 490, 497, the Court noted that "the purpose of the Act is to promote peaceful settlements of disputes

administrative and itself determine the question of law; it is the senior partner."

The Board's conclusion as to what would effectuate "the purposes of the Act" is plainly one of law. Compare Jaffe, *supra*, 69 Harv. Law Rev. at 241 (emphasis supplied): "A finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect. It can, for example, be made by a person who is ignorant of the applicable law. Thus a statute may provide compensation for injuries arising out of and during the course of employment. It has been found that an employee while at work has been intentionally hit on the head by a fellow employee. This is a finding of fact. It owes nothing to the compensation statute. If, however, it is asserted that the injury arose out of the employment and is therefore compensable, the assertion is something more than a finding of fact; it is, in our view, a conclusion of law. The assertion cannot be derived by one who is ignorant of the applicable statutes. It is, unless it is a purely arbitrary exercise of power, an assertion *that the purpose of the statute will be served* by awarding compensation."

by providing legal remedies for the invasion of employees' rights."⁶ And in *Wallace Corporation v. NLRB* (1944), 323 U.S. 248, 253-254, 65 S.Ct. 238, 241, the Court said:

"To prevent disputes like the one here involved, the Board has from the very beginning encouraged compromises and settlements. The purpose of such attempted settlements has been to end labor disputes, and so far as possible to extinguish all the elements giving rise to them."

In the present case the labor dispute was ended in 1956 through an agreement arrived at by the employer and the collective bargaining agent of the employees—the union that had initially brought the charges. Labor peace was restored. The Board did not find anything wrong with the agreement and there is not the slightest criticism of it in the Board's brief. The elements giving rise to the dispute—the non-recognition of the union and the alleged discriminatory discharges—have long ago been extinguished. Collective bargaining has been established; industrial strife has been ended. The contract negotiated by the parties was the first one in the history of the area (R. 194-195). For over three years now respondent and the union have bargained peacefully.⁷

In light of this, what useful purpose could conceivably be served by posting notices,⁸ and offering reinstatement and back-pay to a large number of former employees? The

(6) In accord with *Knickerbocker Plastic* and *Fansteel* see e.g., *American Communications Ass'n. v. Douds* (1950), 339 U.S. 382, 70 S. Ct. 674; *NLRB v. Fainblatt* (1939), 306 U.S. 601, 59 S. Ct. 668; *Consolidated Edison Co. v. NLRB* (1938), 305 U.S. 197, 59 S. Ct. 206; *Ohio-Alloys Corp. v. NLRB* (6th Cir. 1954), 213 F.2d 646, 649; *Inland Steel Corp. v. NLRB* (7th Cir. 1948), 170 F.2d 247, 265, aff'd. 339 U.S. 382, 70 S. Ct. 674; 29 USCA §§ 141, 151.

(7) If there is any question about that, the Board can certainly ascertain the facts with ease.

(8) It is undisputed that all employees involved have been notified (R. 192-193). Dredging this matter up before new employees can only give rise to needless questions and tensions.

Board suggested none in its order (R. 190) and it suggested none in its brief (Board Brief 41), where it attempts to brush off the entire issue in a footnote. And it is obvious that there is none.

Lacking a reasonable basis for its action, the Board contents itself with the remarkable argument that "the refusal of the Board to dismiss the instant case cannot prejudice respondent unless respondent has failed to remedy, or again commits, unfair labor practices." (*Ibid.*) Carrying out the Board's order could only threaten the industrial peace which has been achieved (R. 192, 195; again this is undisputed). Offering reinstatement to persons already placed on a preferential hiring list years ago is obviously prejudicial to respondent in terms of its personnel administration—some 146 employees are covered by the order which the Board seeks to enforce here (R. 172, 181-183, 200). And complying with the back-pay provisions would plainly be detrimental to respondent, not only because of the amount of back-pay, but also because of the expense of additional proceedings and of computation.⁹

In short, the Board cites no reasons or evidence, and not a shred of evidence appears in the record why the compelling grounds stated in support of the motion (R. 185-188, 190-195) should not be recognized and accepted. The

(9) Again the Board does not say why or how this would carry out the policies of the Act. Its brief merely states the conclusion, without reference to any facts or reasons, that "the Board's insistence on its remedy, and its refusal to accept the private settlement, is manifestly in the public interest." (Board Brief 41). Such bald statements as to what is manifest only highlight the arbitrariness of the Board's position.

It is undisputed that back-pay was not the main interest of the employees, that their primary objectives were realized, that the number of employees in a position to collect back-pay and the amount of it is conjectural and difficult to ascertain, and that "the only objection which has been made of any kind or nature emanates from a small group of employees, who for their own political purposes within the Union and pique, seek to embarrass it." (R. 191-194.)

Board's blanket refusal to do so is plainly unreasonable and capricious. "We have said that the power (of the Board) to command affirmative action is remedial, not punitive." *Republic Steel Corp. v. NLRB* (1940), 311 U.S. 7, 12, 61 S. Ct. 77, 79. Here the remedial purposes of the Act have been concededly accomplished; the Board now seeks to punish respondent by exacting retribution.¹⁰ This the Board may not do. To quote more fully from the *Republic Steel* case, *supra* (311 U.S. at 11, 61 S. Ct. at 79):

"We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.' We have said that the power to command affirmative action is remedial, not punitive. *Consolidated Edison Company v. National Labor Relations Board*, 305 U.S. 197, 235, 236, 59 S. Ct. 206, 219, 83 L.Ed. 126. See, also, *National Labor Relations Board v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 267, 268, 58 S. Ct. 571, 574, 575, 82 L.Ed. 831, 115 A.L.R. 307. We adhere to that construction."¹¹

(10) With respect to back-pay, the inconsistency of the Board's position is shown by its statement that it acts "as a public agency safeguarding the public interest and not to further the interest of a private litigant" (Board Brief 41). Only private interests could be served by back-pay; the Board does not show or even claim that this is necessary to safeguard the public interest.

(11) In accord, e.g., *NLRB v. Virginia Electric & Power Co.* (1941), 314 U.S. 469, 477, 62 S. Ct. 344, 348 ("The sanctions of the Act are imposed not in punishment of the employer but for the protection of the employees."); *NLRB v. Braswell Motor Freight Lines* (5th Cir. 1954), 213 F.2d 208, 209 (the Board "has no authority to punish an employer for wrongful conduct.")

Accordingly, we respectively and vigorously urge that the Board's summary refusal to give effect to the concededly fair settlement and to permit withdrawal of the charge or dismissal lacks any reasonable basis and is arbitrary and capricious.

II.

RESPONDENT'S APPLICATION FORM DOES NOT VIOLATE THE ACT

We submit that the Board's unreasonable refusal to give effect to the settlement disposes of the case. But we shall proceed to show that the record contains no substantial evidence to support the Board's conclusions that respondent had committed unfair labor practices. The principal charges against respondent concern allegedly improper lay-offs and discharges. Before we turn to them, it may be helpful to deal with the simpler matter of respondent's application form.

At the beginning of the 1955 season—that is after the discharges and after the election—respondent adopted a new form of employment application. It included the question: "To what Trade, Professional or other organizations are you a member [sic]: (Do not name any organization which would reveal your race, religion, color or ancestral origin.)" (R. 1205; Board Brief 8.) The form previously used did not call for this information. The Board concluded that job applicants would interpret this question as calling for the disclosure of union affiliation and that respondent thereby interfered with, restrained and coerced its employees in violation of section 8(a) (1) of the Act (Board Brief 8-9).

These conclusions are erroneous and unsupported by the record for several compelling reasons. *First*, the Board cites no evidence, and there is none, that this form was intended to or generally interpreted by either respondent

or job applicants as calling for the disclosure of union membership. The form was adopted when respondent was running out of its old short form and was one widely used in the industry (R. 1172-1174). Even the Board's witnesses testified that they filled out identical forms at other canneries (R. 549, 583-584).

Second, the Board refers to no evidence, and there is none, that anyone was actually "interfered with, restrained or coerced." The Board does not claim that respondent discriminated against union members in 1955 or at any time since the adoption of the new form.

Third, even if it be assumed, despite the lack of evidence, that the form sought information about union membership, it is settled that eliciting such information is not in and of itself a violation of the Act.¹² Faced with this, the Board argues that "the use of such forms in a context of intensive hostility to unions" is improper (Board Brief 27). But whatever the "context" of hostility may have been during the previous year (and we urge there was none), there is not the slightest evidence of any hostility in 1955 or thereafter, and the Board does not contend there is. On the contrary, the union and respondent had settled their dispute by early 1956; the union was and is recognized and the parties have been bargaining peacefully since then (*supra* I). Let us bear in mind that the Board's decision here is dated August 1957—long after any "context of hostility" had disappeared. At this point it is obviously absurd to deny respondent the right to use an application form which is widely used throughout the industry.

(12) E.g. *NLRB v. McCatron* (9th Cir. 1954), 216 F.2d 212, 216, and cases there cited; *Wayside Press v. NLRB* (9th Cir. 1953), 206 F.2d 862, 864; *NLRB v. Associated Dry Goods Corp.* (2nd Cir. 1954), 209 F.2d 593, 595; *NLRB v. Mississippi Products* (5th Cir. 1954), 213 F.2d 670, 673; *NLRB v. Ozark Dam Constructors* (8th Cir. 1951), 190 F.2d 222, 227.

In further response to the Board's context-of-hostility argument, this Court has been quite specific as to when interrogation regarding union membership violates section 8(a) (1) of the Act. In *NLRB v. McCatron* (9th Cir. 1954), 216 F.2d 212, 216, the Court said:

“We are of the opinion that in order to violate § 8(a) (1) such interrogation must either contain an express or implied threat or promise, or form part of an overall pattern whose tendency is to restrain or coerce. We so held in *Wayside Press, Inc., v. N.L.R.B.*, 9 Cir., 1953, 206 F.2d 862. Other circuits have taken the same view. [Citations.]”

The Board has neither shown nor urged that the application form contained a threat or promise or that, at the time it was adopted or at any time since then, there has been an overall pattern whose tendency is to restrain or coerce. The form has never been put to any improper use. The Board's conclusion is plainly erroneous.

III.

THE OCTOBER 15, 1954 LAY-OFF WAS LEGAL

A. The Board's Conclusion That Respondent Shipped Apples to the Co-op to Enable it to Lay Off Union Adherents Is Not Supported by the Evidence.

1. The economic circumstances leading to the lay-off.

There is no conflict over the fact that at the time of the lay-off respondent did not have a sufficient supply of apples on hand or in prospect to continue operating two shifts (Board Brief 30). The Board contends, however, that respondent's use of the Co-op to process some apples not only brought this condition about, but “that respondent shipped the apples to the Co-op to enable it to get rid of Union supporters in advance of the election.” (Board Brief

30, 31.) Whether this finding is justified is indeed, as the Board says, "the basic question on this phase of the case." (*ibid.*)

The finding is not supported by the evidence because of the following facts, largely undisputed, which we will first summarize and then review in greater detail.

(a) Use of the Co-op to process some of respondent's apples was brought about by the size and condition of the apple crop.

(b) Shipments to the Co-op started in September 1954, long before any election was scheduled. Respondent's officials began to consider the question of shipments in August, and had already made a shipment in July.

(c) Use of the Co-op, of which respondent was a member, was consistent with past practice. The amount shipped by SAGU was not excessive and was in fact only a small percentage of respondent's total crop.

(a) The size and condition of the apple crop.

(i) *The size.* There is no dispute that the 1954 crop was substantially heavier than the prior year. The Trial Examiner so found (R. 75), but he mistakenly gave the increase as 12% (*ibid.*). The report of the Sonoma County Department of Agriculture which is in evidence, shows a jump from some 81,000 tons to over 103,000 tons—an increase of more than 25%.¹³ The amount of apples received by respondent increased proportionately from 13,000 tons in 1953 to over 16,700 in 1954 (R. 1302, 1305).

(ii) *Condition of the crop.* Why is the question of condition important? Because, as the Trial Examiner noted, apples delivered by growers are classified as cannery apples

(13) R. 1313, 1314. With respect to R. 1314, the above figure translates boxes into tons, in accordance with note 2 on R. 1314.

or as fresh fruit; cannery apples being those which cannot be sold as fresh fruit because of their kind, size or quality (R. 75). The state of California sets standards for determining whether an apple is fit for fresh consumption (R. 1087, 1088).

Condition is further important because it affects the number of "culls". Apples classified as fresh fruit are sorted in the packing shed and unmarketable apples are culled out (R. 75). In the process of culling, the bloom which helps to preserve an apple is wiped off. Also, culls receive a certain amount of bruising. As a result they will not keep as long as apples which are immediately classified as cannery apples, without going through the packing shed (*ibid*).

Thus, the condition of the crop determines how much of it has to be canned, as well as the speed which is needed to avoid spoiling. The worse the crop, the greater is the proportion that is canned.

What was the condition of the 1954 crop? It was considerably poorer than in prior years. (R. 809-810, 831, 897-898). The season was an "unusually hard" one for grading out apples due to "extreme" cull-out from sunburn which cracked a big percentage of the apples (R. 1089). Two scorching days in June 1954 had sunburned or scalded a large part of the crop at a time when the apples were immature and not well covered by leaves (R. 1090; testimony of neutral witness). There was an excessive amount of bitter pit and fungus disease (R. 897-898). After harvesting, because of the quantity and condition of the crop and respondent's lack of additional storage facilities, there was substantial spoilage (R. 721, 821, 824, 834, 898-899, 905). There was also a great percentage of culls (R. 809-810, 898, 1089, 1091-1092). Much of the crop which would normally be packed as fresh fruit had to be canned (R. 806, 809-810, 899, 1272, 1302, 1305).

As the Trial Examiner found, while the 1954 crop was bigger than in 1953, "less than half as much of the crop of early apples was fit for sale as fresh fruit." (R. 75.)

These were the conditions facing respondent when it decided to turn to the Co-op for assistance.

(b) These conditions led to the use of the Co-op long before any election was pending.

Faced with this unusually large and poor crop, members of respondent's board of directors began in August to urge respondent's manager, Martini, to ship part of the crop to other canneries for processing so as to minimize further spoilage and to salvage as much of the crop as possible (R. 815, 831-832, 958-959). Suggesting this step were respondent's chairman of the board, the chairman of its cannery committee, and the chairman of its fresh fruit committee (*ibid*).

At first Martini felt he might be able to handle the apples himself (R. 832-833). But in September, as more apples were coming in and with the number of culls constantly increasing, he agreed with SAGU's officers and board members that the Co-op's assistance was needed (R. 833-834, 905, 958-959). Accordingly, he began shipping apples to the Co-op on September 13 and continued such shipments to October 15 (R. 905, 1309-1311).

No election had been scheduled or directed when these shipments started; the election was not ordered by the Board until October (R. 1203).

(c) Use of the Co-op, to which respondent belonged, was consistent with past practice and the amount of apples shipped to the Co-op, far from being excessive, was only a small percentage of the total.

There is no controversy over the fact that respondent had used the Co-op for processing both in the prior year

(R. 1268) and in July of 1954 (R. 902-904). The Board stresses that in 1953 shipments to the Co-op were 155 tons as against 1,358 tons in September and October 1954 (Board Brief 14, 28, R. 1268, 1298-1300, 1309-1311).

Thus, the increase in shipments to the Co-op was 1,200 tons. But, as we have noted, respondent received 3,700 tons more apples in 1954: its receipts went from 13,000 tons in 1953 to 16,700 in 1954 (R. 1302, 1305). It is obvious, therefore, that respondent absorbed the bulk of the increase itself. These undisputed figures knock the underpinning out of the Board's conclusions. For if respondent utilized the Co-op even with the 13,000 ton crop of 1953, the increased use with the much longer 1954 crop is obviously justified, particularly since the 1953 shipments to the Co-op are not attacked by the Board.

The following data, again undisputed, make the soundness of respondent's position even clearer: of the 13,000 tons of apples which respondent got in 1953, it delivered a total of 1,400 tons to driers and processors, including the Co-op (R. 1268, 1302), leaving respondent a balance of 11,600 tons. In 1954, respondent received 16,700 tons and delivered to driers and processors, including the Co-op, a total of 2,500 tons (R. 1268, 1305), leaving respondent a balance of 14,200 tons.

Thus, even with the smaller 1953 crop, respondent had needed outside assistance. In 1954, respondent handled as much of the increase as it could itself. Far from cutting production to defeat the union, it increased it. In fact, respondent itself canned 8,500 tons in 1954 (R. 1305), as against 6,500 tons in 1953 (R. 1302)—an increase of over 30%.

If anything further is needed to show the imaginary nature of the Board's "illegal diversion" contention, it is that all of the shipments to the Co-op in September and October of 1954 amounted to only 8% of the crop received by re-

spondent that year. To argue that shipping this small percentage under the crop conditions admittedly facing respondent and at a time when no election was scheduled, “can be explained only on the basis that it enabled respondent to effect a substantial layoff of Union members in advance of the election” (Board Brief 33), sweeps well beyond the realm of legal argument and into the land of fantasy.

Finally, the Board—as did the Trial Examiner—completely ignores the fact that respondent was a member of the Co-op (R. 836, 838, 934-935, 1096-1099). The Board would make it appear that respondent in sending apples to the Co-op for processing was sending them to a stranger or to a competitor. This is another and significant example of the Board ignoring the facts to bolster its theory of diversion for ulterior motives.

2. The arguments of the Board.

Against this very substantial evidence of the economic reasons for utilization of the Co-op, the Board cites the testimony of Frank Unciano. A week or so after the shipments began, Unciano allegedly asked respondent’s plant superintendent Duckworth why they were sending apples to the Co-op. Duckworth supposedly answered that “he was trying to finish all the apples as fast as they could, because they were afraid the Union was going to get in there * * *” and that “he did not want to do business with the Unions, he doesn’t want to sign or whatever happen * * *” (R. 516, 517). Duckworth denied having made any such statement (R. 111).

We recognize that this is not the proper forum to attack the credibility of a witness, and we make no such attack. Rather, we are constrained to note that the Trial Examiner accepted Unciano’s testimony without discussion of the factors bearing on resolution of the conflict and despite serious

questions as to its credibility.¹⁴ This is a remarkable omission since Unciano's garbled testimony stands alone in tying the Co-op shipments to any improper motive.

Except for this testimony, the Board only makes arguments which are not supported by the record:

(a) We have previously dealt with the Board's raised eyebrow over the fact that more apples were shipped to the Co-op in 1954 than in 1953. We observed this increase was small in relation to the big jump in apples received by SAGU, that SAGU handled most of the increase itself, and that SAGU's own production was substantially greater in 1954 than in 1953. The evidence shows clearly that SAGU made every effort to use its own productive capacity to the hilt in light of the crop conditions and that it succeeded in this effort.

(b) The Board argues that having the apples processed by the Co-op cost respondent more than doing it itself (Board Brief 14, 31). The only evidence cited by the Board relates to transportation costs (R. 1268); the Board refers to no testimony indicating that Co-op processing was otherwise more expensive. In this connection, intelligent discussion is not made easier by the Board's habit of making factual assertions either without any reference to the record (e.g. on page 14, where it is claimed that SAGU paid the

(14) Duckworth related the only occasion when he talked about the Union with Unciano (R. 1108-1110). Unciano and his wife were hostile to the management: Mrs. Unciano who had been a floorlady had been reprimanded by manager Martini, and both Unciano and his wife resented it (R. 1109). Unciano came to Duckworth's home to tell him so (R. 1108-1109). While there Unciano asked Duckworth what he thought of the Union and Duckworth, in reply said that he didn't see how it could do him much good in a short seasonal industry, but that Unciano could do as he felt about it (R. 1109). This conversation was not denied by Unciano and there was no other conversation pertaining to the Union (R. 1108, 1111).

By contrast to the Trial Examiner's cursory treatment of this conflict, he analyzed many less important conflicts carefully whenever such analysis appeared to support his conclusions.

Co-op \$1.58 for every case of apple sauce canned) or citing the Trial Examiner's report as evidence. The Board engages in the latter practice with particular persistency and sometimes cites only the report (e.g. on page 31 of its brief). This is not helpful to counsel or to the Court which has the task of determining whether the Trial Examiner's findings—which were adopted by the Board—are supported by substantial evidence.

Returning to the question of cost, the Board refers to no evidence showing a significant difference in processing costs. It ignores the important fact that respondent was a member of the Co-op (*supra* p. 18) and would thus participate in its profits. It further ignores the fact that respondent was faced with difficult problems due to the admittedly unusual size and condition of the apple crop.

(c) The Board argues that respondent should have finished processing the overflow by the middle or end of September (Board Brief 31). Since this curious contention fails to refer to any evidence, we will merely refer to the fact that respondent's own processing increased substantially in 1954 over 1953; its own cannery production jumped over 30% (*supra* p. 17).

Thus, against the overwhelming evidence produced by respondent there is only the statement of Unciano. Thus, the record as a whole utterly fails to support the Board's finding that the shipment of apples to the Co-op was motivated by a desire to get rid of union supporters before the election.¹⁵

(15) The applicable legal principles are discussed in Section III D. *infra*. With respect to Unciano's testimony, compare *Osceola Co. Co-op Cream. Ass'n v. NLRB* (8th Cir. 1958), 251 F.2d 61, 66, 67, where the court analyzes a Trial Examiner's credibility finding, finds it of doubtful validity, and concludes that even if the anti-union statement that was testified to was made, "the record still lacks substantial evidence to support the Board's finding." (251 F.2d at 67.)

B. The Board's Conclusion With Respect to Warehouse Space Is Not Supported by the Evidence.

We have just discussed one of the main reasons for the shut-down of the night shift, namely the lack of enough apples to warrant two shifts. We saw that the Board's argument that this was caused by an illegal diversion to the Co-op is untenable.

The second reason for resumption of a single-shift operation was a lack of sufficient warehouse space to store the anticipated production of two shifts (R. 817, 818, 819, 823, 911, 912, 961, 963, 1298, 1299).

The Board on pages 32 and 33 of its brief engages in curious arithmetic to attempt to prove that enough space was available. It argues, in effect, that respondent had room for 510,000 cases of cans and had on hand less than 390,000.¹⁶ Accepting this latter figure for sake of discussion, the former is plainly fallacious for two reasons:

First, the 510,000 case figure includes a cold storage room with a capacity of 140,000 cases (*ibid*). The Board fails to mention the fact that in 1954 this room was being used to store fresh apples (R. 815, 817, 836, 910, 913) and was thus not available for canned goods. The evidence is not only uncontradicted, but particularly credible when we recall that the 1954 apple crop was much bigger than in 1953. The Board goes well beyond the boundary of permissible argument when it says that this cold storage room "after being dried out, served as an insulated storage space for 140,000 cases" (Board Brief 33), without mentioning that the testimony which it cites for this statement refers to the year 1953 (R. 1196). This testimony is significant also because as the Board witness there points out even in 1953 the

(16) 1954 production of 495,000 cases plus carry-over of 40,000 cases less shipments of 145,000, according to Board Brief 33.

temporary conversion of the cold storage room to a canned goods warehouse was not made until December (*ibid*). Consistently, in 1954, merchandise was moved into that room in December (R. 944). But in October, as we have seen, the room contained apples.

Hence, this facility cannot be counted for storing canned goods, thus reducing the available space to 370,000 cases. Once this is done the situation confronting SAGU's management is made quite clear: with a capacity of 370,000 cases at best, room had to be found for 390,000 cases less whatever would be shipped after October 15. The Board's sleight-of-hand arithmetic backfires to show that SAGU's concern over storage room was certainly real.

Secondly, this concern becomes even more real when we consider the following undisputed facts, again wholly ignored by the Board:

(1) Canned goods should preferably be stored in insulated and heated warehouses to avoid rust damage (R. 839, 840, 912, 913, 947, 961-963);

(2) Rusted cans necessitate salvage attempts at additional cost: if the rust is not too great, the cans are cleaned with steel wool or sandpaper, causing added expense (R. 840, 841); cans that cannot be cleaned are either downgraded and sold for less or—if the rust is too great—discarded altogether (R. 840, 841, 936, 961-963);

(3) While in 1954, the respondent was using whatever storage facilities it had, only one warehouse was insulated (R. 908, 839); it held 180,000 cases (R. 842, 850).

In short, insulated capacity had already been exceeded, extra capacity was being used at the risk of rust and the limits of even this extra space were being approached. In light of this, the reduction to one shift was obviously a reasonable step. The record fully supports return to a single

shift to avoid aggravation of the storage problem; more importantly, the record entirely fails to support the Board's contrary contention, as to which it has the burden of proof (III D 1, *infra*).

C. The Board's Conclusion That the Lay-off Was Carried Out Discriminatorily Is Not Supported by the Evidence.

Turning from the substantial economic reasons which led to the discontinuance of the night shift to the manner in which the lay-off was actually carried out, we shall see that the Board ignored a wealth of substantial testimony and that its finding of discrimination is not supported by the record.

1. The decision to lay off the night shift was made before respondent knew of the election.

There is no dispute that the decision to discontinue the night shift was reached at a regular meeting of respondent's directors on October 12, 1954 (R. 850-851, 910-912, 959-961, 1298-1299; Board Brief 15). Nor is there any dispute that at that time respondent had not yet received notice of the election; the Board does not claim that respondent had such knowledge.¹⁷ But in its brief the Board, as did the Trial Examiner, persistently ignores this because it does not fit the stress they put on the fact that the lay-off occurred shortly before the election. Respondent's ignorance of the election date contradicts the theory that the lay-off was suddenly made with the purpose of influencing the election.

In this connection, it also bears emphasis that the Board determined as eligible to vote in the election those em-

(17) In final argument on behalf of the General Counsel it was stated that notice of election was mailed to respondent on October 12, 1954, i.e. the day of the director's meeting. (See page 3647 of typed transcript on file; the argument is not in the printed record.)

ployees who were employed during the payroll period ending October 2, 1954 (R. 1203; Board Brief 16)—a date preceding the October 15 lay-off and preceding also the decision of October 12 to reduce to a one-shift operation.

In short, the time sequence is as follows:

October 2: The payroll period date fixed by the Board for determining eligibility to vote. This date was set later.

October 12: Respondent's board of directors decides to reduce to a single shift.

October 12: Board mails notice of election to respondent.

October 15: Lay-off.

October 19: Election.

2. The selection of the lay-off was not made discriminatorily.

Early in the morning of October 13, the day following the directors' meeting, manager Martini told sales manager McGuire that Friday, October 15, 1954, would be the last day for the night shift and asked McGuire to inform Duckworth, the superintendent of the cannery, to prepare a list of employees whom Duckworth and other supervisors wanted to retain (R. 851-854, 914-915). McGuire so informed Duckworth (R. 853-854) and prepared for Duckworth two lists, one of all day shift and one of all night shift employees (R. 854-855).

Duckworth called a meeting either on the afternoon of October 13 or 14, at which were present Herrerias, the night floor lady who was to become the floor lady on the single shift, and Williams, the night shift foreman (R. 762-764, 879). During the course of the meeting warehouse foreman

Aguire came in and presented a list of the employees under his supervision whom he decided should be retained. He stayed only a few minutes (R. 764, 878-880, 884-885). Doty, who was a laboratory technician and who had worked at the plant for a number of years was consulted about the length of service of some of the employees (R. 743). The selection of employees to be kept for the day shift was made on the basis of merit and in situations where there were individuals of equal merit, length of service was considered (R. 462-463, 478, 765, 774, 886). This testimony was corroborated by Doty (R. 743, 744).¹⁸ There was no discussion as to whether any individual was a member of a labor organization or whether he was for or against any union (R. 744, 478, 886).

After the names of those to be retained had been checked off, the lists were returned to McGuire who personally typed the names on a separate sheet which he used to read at the meeting with the employees on October 15 (R. 855-856, 858-859).

3. The Board's arguments are not based on the record.

(a) The lay-off was not sudden.

The Board in its brief argues repeatedly that the lay-off was "accelerated" or "sudden" and that it was shortly before the election. We have seen that there was nothing accelerated about it, that it was brought on by circumstances which had nothing to do with the union and that it was not motivated by any anti-union considerations.

With respect to the fact that the discontinuance of the night shift preceded the election by a few days, we saw that respondent had not been notified of the election at the time

(18) The Trial Examiner and the Board make no reference whatever to Doty's testimony.

it decided on this step and the Board does not contend to the contrary. Hence the time factor is plainly immaterial. Further, the Board has held that the time element does not *ipso facto* result in giving rise to an unfair labor practice.¹⁹

(b) Respondent had no knowledge of the identity of union adherents.

The Board's argument to the contrary (Board Brief 28) relies (i) on a statement attributed to Herrerias that respondent would have spies at union meetings and (ii) on testimony that Martini talked to a few employees about their union activities.

It is regrettable that space has to be taken to deal with this kind of logic. It is a long jump from Herrerias' statement about what would happen to what did happen, and the simple fact is that the Board did not find that respondent had any spies at Union meetings. The inference which counsel asks the Court to make was not made by the Board, and it was not made because there were no spies.

As concerns the alleged comments of Martini cited by the Board (Board Brief 28, 4-6), they show the opposite of any extensive knowledge: he asked two women, Pate and Lindsay what they thought about the union and had subsequent brief conversations with them (Board Brief 5); he knew Mrs. Storey was a union supporter because she identified herself as such and demanded that he meet with the union (R. 320-321); he talked to her and asked her to do him the favor of not talking about the union in the building where it would disrupt employees, but that she could talk outside the building even on the company grounds (R. 323-324); on that occasion Layman accompanied Mrs. Storey (R. 322-

(19) *Mackie-Lovejoy Mfg. Co.* (1953), 103 NLRB 172, 183 (no violation was found even though the lay-off occurred while an election was pending). And there is no requirement to give advance warning or notice of a discharge. *Oscola Co. Co-Op. Cream. Ass'n v. NLRB*, *supra*, 251 F.2d at 65.

323); and he answered a question of a group of women employees about the union (Board Brief 5-6). Thus, the evidence cited by the Board shows, at the most, that Martini knew of four (4) union supporters out of over two hundred employees (Board Brief 16) and as to two of the four, Storey and Layman, he did not seek such knowledge. This is obviously far from extensive familiarity of the identity of union supporters.

Finally, the Board says: "On the evening of the election Martini met Marie Tripp, who had been laid off on October 15 and sought to ascertain Tripp's attitude toward the Union by asking how the election returns suited her." (Board Brief 6.) This testimony is plainly inconsistent with the Board's claim that respondent knew who the union adherents were and discharged them discriminatorily. For if respondent had such knowledge by October 15, then why did Martini after the subsequent election seek "to ascertain Tripp's attitude toward the Union?"²⁰ The conversation shows, if anything, the opposite of the Board's conclusion.

(c) Employees from both shifts were selected for the lay-off.

The Board makes an issue of the fact that the crew for the single shift was selected from both day and night shifts; the Board says that in 1952 and 1953 primarily only the night shift employees were laid off (Board Brief 16-17). However, in 1954 as in the past when the night shift was discontinued, the crew for the single shift was chosen from both shifts. This was testified to both by respondent's witnesses and by witnesses called on behalf of the General Counsel (R. 253-254, 401, 725, 728).

(20) Further, the testimony dispells any such motive on Martini's part. The conversation occurred at a filling station. Tripp was having a beer and Martini offered to buy her one. She told him some of her personal problems. He asked her how the election returns suited her—a perfectly normal question in social conversation following an election (R. 928-929).

It seems to be the theory of the Board that the proportion of those selected from both shifts for the single crew have to be the same each year. We know of no such Board policy or legal requirement. A matter of this kind is clearly one for the exercise of management's judgment. Martini, as the new manager (R. 223), had the right and obligation to make such procedural changes as he thought necessary and was not bound by whatever his predecessors may have done. If changed practices of this kind subject an employer to a risk of prosecution by the Board we have reached the point where management is no longer free to exercise its basic and necessary functions.

D. In Light of Established Legal Principles the Board's Conclusion Cannot Stand.

We embark upon a restatement of the basic principles governing judicial review of Board cases with some reluctance because of their familiarity. We feel that such a restatement will provide a useful perspective for the present case and elucidate the insubstantiality of the Board's position. These principles apply also to the individual discharges which we will discuss later.

1. The nature of the Board's burden of proof.

(a) The Board failed to establish the key elements of its claim.

In discharge cases it is settled not only that the burden of proof is on the Board, but that it must establish three elements: (a) knowledge by the employer that the employee was engaged in protected activity; (b) a discharge because he had engaged in such activity; (c) that the discharge had the effect of encouraging or discouraging membership in a labor organization. This Court said lucidly in

NLRB v. Kaiser Aluminum & Chem. Corp. (9th Cir. 1954), 217 F.2d 366, 368:

"The charge of the complaint is that these three particular discharges were discriminatory. Discrimination relates to the state of mind of the employer. 'The relevance of the motivation of the employer in such discrimination has been consistently recognized * * *.' The General Counsel had the burden of the issue. Substantial evidence must have been adduced (1) to show the employer knew the employee was engaging in a protected activity, (2) to show that the employee was discharged because he had engaged in protected activity, and (3) to show the discharge had the effect of encouraging or discouraging membership in a labor organization. Although the Board is entitled to draw reasonable inferences from the evidence, it cannot create inferences where there is no substantial evidence upon which these may be based. Unless there is reasonable basis in the record for making of the three essential findings, the employer who is permitted to discharge 'for any reason other than union activity or agitation for collective bargaining with employees' need not justify or excuse his action."

Similarly, in the recent decision in *NLRB v. Ford Radio & Mica Corp.* (2nd Cir. 1958), 258 F.2d 457, 461, the Court says:

"The burden is upon the General Counsel for the Board to show that the employer knew the employees were engaging in protected concerted activities and that they were discharged for engaging in such activities. *N.L.R.B. v. Kaiser Aluminum & Chemical Corp.*, 9 Cir., 1954, 217 F. 2d 366. In addition the General Counsel must show in case of a section 8 (a) (3) violation as opposed to only a section 8 (a) (1) violation that the discharges tended to discourage or encourage membership in a labor organization. *N.L.R.B. v. J. I. Case*, 8 Cir., 1952, 198 F.2d 919."

The Board does not discuss these elements either as to lay-off or the three individual discharges and it is clear that they were not established. We have seen that respondent had no knowledge of the identity of union sympathizers and that the lay-off was not caused by their union sympathies or activities, if any. Further, there is no evidence whatever that the discharges had the effect of discouraging membership in the union. In fact, by the time the Trial Examiner even submitted his report respondent and the charging union settled their dispute and respondent recognized the union as the collective bargaining agent of the employees (R. 186, 188). And the bulk of the discharged employees voted in the election²¹ and the Board itself dismissed the representation proceeding growing out of the election at the joint request of respondent and the union (Board Brief 6, note 8). Patently there was no adverse effect on union membership.

(b) The Board improperly attempted to shift the burden of proof to respondent.

As noted, the burden to show that the discharges were discriminatory was on the Board.²² Yet in dealing with the economic reasons for the lay-off, the Trial Examiner and the Board act continuously as if respondent had to establish the absolute necessity of the lay-off and as if the Board were free to second-guess management decisions. "I am not convinced that removal of apples * * * was dictated by a

(21) Considering Board evidence only, there were 232 employees before the lay-off (Board Brief 16). 211 voted (R. 1202).

(22) In addition to the cases previously cited, see, e.g., *NLRB v. Standard Coil Products Co.* (1st Cir. 1955), 224 F.2d 465, 470; *NLRB v. Miami Coca-Cola Bottling Co.* (5th Cir. 1955), 222 F.2d 341; *NLRB v. Wagner Iron Works* (7th Cir. 1955), 220 F.2d 126, 133; *NLRB v. West Point Mfg. Co.* (5th Cir. 1957), 245 F.2d 783, 786.

desperate need,” says the Trial Examiner in his report (R. 83). And again: “I am not convinced that the need for getting the assistance of the Co-op was as pressing as was represented, * * *” (R. 82). And again: “any management must reasonably be expected to have foreseen earlier that the warehouses would fill up” (R. 85). And again: “I am convinced that the apples in cold storage were not in *desperate* condition * * *” (R. 84). And again: “I am not persuaded that the apples shipped to the Co-op from cold storage were only such apples as could not be used up in time * * * (R. 88).

Was it respondent’s duty to establish a “desperate need?” Of course not. Was it its duty to show that any management would have sent precisely the same amount of apples to the Co-op under the circumstances? Again the question answers itself. Is the Board entitled to substitute its judgment for that of management in making what is clearly management’s decision? That is precisely what was done here.

The Board argues that a disproportionate lay-off of union workers leaves it to the employer to explain the discharge (Board Brief 29). Assuming that this is so, the burden does not shift to the employer to establish desperate conditions.²³ And, as we have seen, thoroughly convincing and largely uncontroverted evidence concerning the reasons for utilizing the Co-op and the available warehouse was produced.

Typical of the impossible burden placed on respondent by the Trial Examiner, as well as of his agility in leaping to invalid conclusions, is the following statement by the Trial Examiner pertaining to the crucial matter of the shipments to the Co-op (R. 89-90) :

(23) *NLRB v. Chicago Steel Foundry Co.* (7th Cir. 1944), 142 F.2d 306, 308, from which the Board quotes, points out that where “there is no evidence negating the inference of discrimination, we cannot say that the inference thus created has been destroyed.”

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“Although it is possible to believe that good business judgment could have dictated the delivery of some apples of an overly large crop to the Co-op for processing to avoid spoilage, I cannot believe, in view of the cost involved, that good judgment dictated the delivery of such large quantities of apples (much of which was not in danger of spoiling) to the Co-op for processing unless the Respondent had an ulterior motive.”

Thus, he grudgingly admits that there may have been a need to ship some apples, but then jumps to the conclusion of an ulterior motive because of the “large quantities” of apples, “in view of the cost involved.” As to cost, he cites no evidence of a significant cost differential and ignores the important fact that respondent was a member of the Co-op (*supra*, p. 18). And as concerns the “large quantities,” he ignores entirely the undisputed facts that they amounted to only 8% of respondent’s crop, that respondent received several thousand tons of apples more in 1954 than in 1953 and that a much larger proportion of them had to be used for canning, that even in 1953—with a smaller and better crop—respondent had shipped some apples to the Co-op, and that respondent handled the bulk of the sharp 1954 increase in deliveries itself—canning 30% more in 1954 than in 1953 and increasing its own canning production by 2,000 tons, while only 1,200 tons more were sent to the Co-op (*supra*, pp. 17, 18).

Yet in view of this the Trial Examiner and the Board could not believe that “good judgment dictated the delivery of such large quantities of apples” to the Co-op (R. 90). We submit that this is sheer ostrich-like unwillingness to see: respondent provided the strongest possible explanation for the lay-off.

2. The Board may not second-guess management.

The Trial Examiner might have sent fewer apples to the Co-op if he had been respondent's manager, although we doubt it. He apparently would have done a lot of things differently. He did not consider respondent's actions reasonable, despite the overwhelming evidence to the contrary. But in addition, he and the Board fall into the classic error of purporting to evaluate respondent's actions in terms of reasonableness. The fallacy of this has been repeatedly exposed. For instance, in *NLRB v. McGahey* (5th Cir. 1956), 233 F.2d 406, 412, the Court said:

"The Board's error is the frequent one in which the existence of the reasons stated by the employer as the basis for the discharge is evaluated in terms of its reasonableness. If the discharge was excessively harsh, if lesser forms of discipline would have been adequate, if the discharged employee was more, or just as, capable as the one left to do the job, or the like then, the argument runs, the employer must not actually have been motivated by managerial considerations, and (here a full 180 degree swing is made) the stated reason thus dissipated as pretense, nought remains but antiunion purpose as the explanation. But as we have so often said: management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8 (a) (3) forbids. *N.L.R.B. v. Nabors*, supra; *N.L.R.B. v. National Paper Co.*, supra; *N.L.R.B. v. Blue Bell, Inc.*, supra; *N.L.R.B. v. C. & J. Camp, Inc.*, supra."

In *NLRB v. Wagner Iron Works* (7th Cir. 1955), 220 F.2d 126, 133, the Court similarly observed:

"Obviously, the Act does not interfere with the employer's right to conduct his business, and, in doing so, to select and discharge his employees. It proscribes the exercise of the right to hire and fire only when it is employed as a discriminatory device. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45, 57 S. Ct. 615, 81 L.Ed. 893; *U.S. Steel Co. v. N.L.R.B.*, 7 Cir., 196 F.2d 459, 465-466. The Board may not 'substitute its judgment for that of the employer as to what is sufficient cause for discharge', *N.L.R.B. v. Williamson-Dickie Mfg. Co.*, 5 Cir., 130 F.2d 260, 264, and discrimination may not be inferred from an employee's mere membership in a union. *Indiana Metal Products Corp. v. N.L.R.B.*, 7 Cir., 202 F. 2d 613; *N.L.R.B. v. William Davies Co.*, 7 Cir., 135 F.2d 179, 183, certiorari denied, 320 U.S. 770, 64 S. Ct. 82, 88 L. Ed. 460. In every case the burden is on the Board to prove that an employee's discharge resulted from his union activities. *Indiana Metal Products Corp. v. N.L.R.B.*, supra; *N.L.R.B. v. Reynolds International Pen Co.*, 7 Cir., 162 F.2d 680, 690."

Among many other such expressions by our courts, we will refer only to the classic one in *NLRB v. Montgomery Ward & Co., Inc.* (8th Cir. 1946), 157 F.2d 486, 490:

"* * * In considering the propriety of these discharges the question is not whether they were merited or unmerited, just or unjust, nor whether as disciplinary measures they were mild or drastic. These are matters to be determined by the management, the jurisdiction of the Board being limited to whether or not the discharges were for union activities or affiliations of the employees."

3. The Board ignores the applicable standards of judicial review.

We have already noted some of the extreme lengths to which the Board went to ignore evidence that runs counter

to its conclusions. The Board's brief reflects this approach and it is not one that either lends weight to its findings or that makes the task of this Court easier in exercising its reviewing functions.

The controlling case on the scope of review is, of course, *Universal Camera Corp. v. NLRB* (1951), 340 U.S. 474, 71 S. Ct. 456, where the Supreme Court discussed the legislative history of the Act's review provisions and called attention to public and congressional dissatisfaction with the "abdication" with which some courts granted enforcement of Board orders under the Wagner Act which provided that the Board's findings were conclusive if supported by evidence. The Court pointed out that the present standard broadens the review responsibilities of courts, although no rigid formula was established. The Court did say (340 U.S. at 490, 71 S. Ct. at 466) :

"We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

The Court also said that Taft-Hartley "definitely precludes" courts from determining "the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence from which conflicting inferences could be drawn." (340 U.S. at 487-488, 71 S. Ct. at 464.)

Accordingly, since *Universal Camera*, courts take the view that "it is our duty to consider not only evidence tending to support the Board's findings but also evidence conflicting therewith."²⁴ "And if it is our duty to consider it then we must pass upon its weight."²⁵

While there is no formula for ascertaining substantial evidence, certain principles have developed in addition to the one of considering the evidence on both sides:

(a) Substantial evidence must be more than suspicion.²⁶ Typical of suspicion is the Trial Examiner's and the Board's conclusion that respondent would not have sent as many apples as it did to the Co-op unless it had "an ulterior motive" (R. 90), and their reliance on testimony that manager Martini sometimes bantered with employees about the union (Board Brief 19).

(24) *NLRB v. Gala-Mo Arts, Inc.* (8th Cir. 1956), 232 F.2d 102, 105; *Oscicola Co. Co-op Cream. Ass'n v. NLRB* (8th Cir. 1958), 251 F.2d 62, 64; *NLRB v. Englander Company* (9th Cir. 1958), 260 F.2d 67, 70; *NLRB v. Hart Cotton Mills* (4th Cir. 1951), 190 F.2d 964, 974, 975; *NLRB v. McGahey, supra*, 233 F.2d at 413.

(25) *United Packinghouse Workers of America, CIO v. NLRB* (8th Cir. 1954), 210 F.2d 325, 330. Compare *NLRB v. West Point Mfg. Co.* (5th Cir. 1957), 245 F.2d 783, 786: "In each case it must be established whether the legal or the illegal reason for discharge was the actually motivating one, and if evidence of both is present we must ascertain whether the evidence is at least as reasonably susceptible of the inference of illegal discharge drawn by the Board as it is of the inference of legal discharge."

(26) *Universal Camera Corp. v. NLRB, supra*, 340 U.S. at 477, 71 S. Ct. at 459.

(b) The pyramiding of inferences does not constitute substantial evidence.²⁷ A startling illustration of such pyramiding going to the basic issues occurs in the Trial Examiner's report at pp. 90-91. Again dealing with the utilization of the Co-op, he infers first that at the time the shipments to the Co-op began on September 13, the Co-op "could not have accepted work from the Respondent" if the peak of the harvest had not well passed—an inference made without the slightest evidence of the Co-op's facilities and production, and based on the express assumption, again without evidence, that the Co-op did not run a third shift. From this inference about the "peak of the harvest," the Examiner draws an inference that by September 13, respondent must have "pretty well" worked off the overflow of apples in its own cannery—a singular piece of logic which leaps from the "peak of the harvest" to respondent's own conditions on a given date and which ignores the wealth of positive evidence as to the actual apple problems confronting respondent (*supra* pp. 14-17).

This second inference, which rests on a number of unstated assumptions, is then used to infer that respondent "exaggerated the seriousness of the situation," which in turn leads to the nimble leap that there was a "diversion of apples to the Co-op in pursuance of an illegal object."

It is striking that this whole chain of inferences does not rest on a single piece of evidence. It begins with an assumption, not based on a single word of testimony, that the Co-op could not have accepted apples from respondent "if the peak of the harvest had not well passed."²⁸ It ends with the

(27) *NLRB v. Miami Coca-Cola Bottling Co.* (5th Cir. 1955), 222 F.2d 341, 344.

(28) "Inferences must be based on evidence, direct or circumstantial, and not upon mere suspicion." *Osceola County Co-op Cream Ass'n v. NLRB*, *supra*, 251 F.2d at 69.

conclusion that respondent acted in pursuance of an illegal object. Against such a process of substituting illogic for evidence a litigant is helpless indeed except for the reviewing powers of this Court.

(c) "The fact that a discharged employee may be engaged in labor union activities at the time of his discharge, taken alone, is no evidence at all of a discharge as the result of such activities."²⁹ And, as the Court said in *NLRB v. McGahey*, *supra*, 233 F.2d at 413:

"With discharge of employees a normal, lawful legitimate exercise of the prerogative of free management in a free society, the fact of discharge creates no presumption, nor does it furnish the inference that an illegal—not a proper—motive was its cause. An unlawful purpose is not lightly to be inferred. In the choice between lawful and unlawful motives, the record taken as a whole must present a substantial basis of believable evidence pointing toward the unlawful one."

(d) Finally, it is of critical importance to bear in mind that "the finding of 8 (a) (1) guilt does not automatically make a discharge an unlawful one or, by supplying a possible motive, allow the Board, without more, to conclude that the act of discharge was illegally inspired."³⁰ Here the Board relies heavily on the 8 (a) (1) charges to conclude that the lay-off was illegal. The two are to be kept separate: "We have frequently sustained 8 (a) (1) charges while rejecting those under 8 (a) (3)."³¹

(29) *NLRB v. Citizen News Co.* (9th Cir. 1943), 134 F.2d 970, 974; *Osceola County Co-op Cream. Ass'n v. NLRB*, *supra*; *NLRB v. Montgomery Ward & Co., Inc.*, *supra*.

(30) *NLRB v. McGahey*, *supra*, 233 F.2d at 410, and cases there cited.

(31) *Ibid.*

IV.

THE BOARD MISTAKENLY INCLUDES A LARGE NUMBER OF EMPLOYEES AS DISCRIMINATORILY LAID OFF

Assuming solely for the sake of discussion that the October 15 lay-off was discriminatory, the Board mistakenly and without evidence, let alone substantial evidence, counts a large number of employees as having been discriminatorily laid off. Many of them were not laid off at all, others who were laid off had been hired after the date determining eligibility to vote in the election, and still others were concededly not union members. The inclusion of these employees among those who are ordered reinstated with back pay is plainly erroneous.

Since the Board's brief is silent on this matter we shall briefly summarize the applicable facts. Let us recall that the lay-off occurred on Friday, October 15; the election took place on the following Wednesday, October 19.

A. Employees Not Affected by the Lay-off.**1. Ensebia (or Eusebia) Carrera.**

She is one of the employees ordered reinstated with back-pay (R. 172, 182). Yet her own testimony as a witness for the Board is that her name was read on the list of those retained on October 15 (R. 1189) and that she left work because she couldn't work days (R. 1190). Similarly, the Trial Examiner shows her as being on the retention list and as being unable to work days (R. 174). Obviously there was no discharge, let alone a discriminatory one.

2. Pauline Ploxa and Dora Rawles.

Their situation is identical to Carrera's. They testified that they were on the retention list, but could not work days (R. 527, 546). Incidentally, both were union adherents (R. 176, 177); Carrera was not (R. 174).

3. Employees who continued to work after the lay-off without interruption.

The following employees worked uninterruptedly from a period preceding the lay-off until long after it; they worked the *full* week of the lay-off and the *full* week following it, i.e. the week of the election: Catherine Perry (R. 1015-1016), Edith Wilson (R. 1016-1017), Erma Bate (R. 1017-1018), Willy Augustin (R. 1022), Joe Bertoni (R. 1023), Lloyd Mills (R. 1026-1027), and Henry Narron (R. 1027-1030). Plainly, their rights were not interfered with and they suffered no loss. Even if their name was not on the retention list read on October 15 there was obviously no discrimination as to them.

Similarly, the following employees also worked continuously and worked part time in each of the two weeks: Marcia Freyling (R. 1010-1011), Rennie Napier (R. 1014-1015), Jessie W. Smith (R. 1019-1020), and Robert DeVilbiss (R. 1024-1026).

If any further corroboration of the fact that these eleven employees were not discriminatorily laid off is needed, it is found in General Counsel's Exhibit 41-E (R. 1249-1250), which lists all of the foregoing employees who were on the night shift except Bate and Narron as having been transferred to the day shift effective October 18.³²

The relevant and undisputed data pertaining to the eleven employees we have discussed may be graphically summarized as follows:

(32) Not on that list are Mills, Smith and DeVilbiss who were already on the day shift (R. 177, 178).

Name of Employee	First Worked Week Ending	Last Worked Week Ending	Hours Worked		Record Reference
			Week Ending October 16	Week Ending October 23	
Catherine Perry.....	August 7	December 11	40	48	1015-16
Edith Wilson.....	July 31	December 11	40	48	1016-17
Erma Bate.....	July 24	December 11	32½	48	1016-18
Willy Augustin.....	July 24	December 11	42¼	50½	1022
Joe Bertoni.....	October 2	December 11	42¼	40	1023
Lloyd Mills.....	October 16	December 31	46	47¾	1026
Henry Narron.....	July 10	November 6	46½	56	1027-30
Marcia Freyling.....	July 24	November 20	8*	8*	1010-11
Rennie Napier.....	October 2	November 20	7¾*	7¾*	1012-15
Jessie W. Smith.....	September 25	November 27	24	24	1019-21
Robert DeVilbiss.....	July 24	November 6	8*	8*	1024-26

*Students who worked one day a week throughout the season.

4. Employees who quit prior to the lay-off.

(a) Employees who hadn't worked for some time prior to the lay-off.

Respondent's practice was to consider an employee who failed to come to work for a day or two as having quit (R. 981). This practice covered a number of employees who had not been working for some time prior to the lay-off on October 15 and thus were not affected by the lay-off because they had terminated their employment earlier.

Thus, Edna McCarl last worked on Friday, October 8 and did not work the whole following week; the payroll records show her terminated on October 8 (R. 982-986). She not only was not affected by the lay-off, but was rehired and worked the full week of October 23 (R. 984). Since, according to the Trial Examiner, she was a union supporter (R. 176), her reemployment is significant evidence that respondent did not discriminate against union sympathizers.

Other employees in this group are:

Susie Coats: last worked on October 12 when she became sick; was still sick on October 15; did not seek re-employment (R. 979-981; 165).

Julia Ann Row: last worked on October 6 (R. 986); there is no evidence of any kind that she ever sought re-employment. Nor did she testify to deny that she had quit.

Stella Vessels: Prior to the October 15 lay-off she last worked on October 13 (R. 990), but she was re-employed and worked 40 hours the following week (i.e. the week ending October 23) and worked continuously to the end of the season (R. 991-992). The lay-off did not affect her at all.

Edith Wasin: before the lay-off she last worked on October 11 (R. 993-994; 165); was re-employed, worked a full 48-hour week during the week following the lay-off and worked continuously to the end of the season (R. 995-996).

Ruth Albertoni: last worked on September 27 and the payroll records show her as having quit at that time (R. 996-997). There is no evidence of any kind that she ever sought re-employment. Nor did she testify to deny that she had quit.

Lyman Allman: didn't come to work on October 15 and the payroll records show him as having quit on that date (R. 1037). There was no contrary testimony by him.

With respect to the Board's contention of discrimination, the facts pertaining to these seven employees are particularly interesting. According to the Trial Examiner's report five were pro-union, two were not (R. 174 ff.). Of the three who were re-employed and worked during the week of the election—McCarl, Vessels, and Wasin—two were listed by him as pro-union and one not (R. 176, 177). There was certainly no disproportionate treatment; and the re-employment of union supporters prior to the election runs counter to respondent's alleged intention to weed out union supporters. Finally, we have seen that as concerns those who were not re-employed, there is not one iota of evidence that they ever sought to come back to work.

(b) Employees who did not complete their shift on October 15.

Following the lay-off meeting in the afternoon of October 15, most of the night-shift employees returned to work and completed their shifts (R. 1044-1068). A number did not—that is they punched out right after the meeting which took place at the start of their shift and did not work their shift at all (R. 1037-1042). These latter were regarded by respondent as having quit (*ibid*; R. 255) because they had been informed both before and after the meeting that they were to return to their jobs following the meeting (R. 892-893, 1102-1103, 1146).³³ Some of those who failed to return to work expressed the view that if they were no longer going to be working for respondent after that day they might as well quit then (R. 1104, 256).

Among the employees who quit in this manner were Breuer (R. 1037), Brott (R. 1038), Cooley (R. 1038-1039), Hance (R. 1039), Hontar (R. 1039-1040), Moriem (R. 1041), Rahm (R. 1041-1042) and Schrum (R. 1042).

It is settled that where a lay-off is announced and employees walk off afterwards without finishing their shift, they have quit without cause and their conduct is not activity protected under the Act. *NLRB v. Jamestown Veneer & Plywood Corp.* (2nd Cir. 1952), 194 F.2d 192, 194.³⁴

B. Employees Who Had Been Hired After Eligibility Date.

We may recall that the eligibility date for the election was October 2; that is, only persons employed on that date could vote (R. 1203). Six of the persons who were laid off on October 15 had not been hired until after October 2:

(33) This is corroborated by the fact that the majority did return (R. 1044-1068).

(34) Cited with approval by this Court in *Texas Co. v. NLRB* (9th Cir. 1952), 198 F.2d 540, 543.

Name	Date of Employment	Record Reference
Virginia Azevedo	October 11	1004
Gatha Crump.....	October 11	1005
Gail Herrell.....	October 13	1006-1007
Amy Sweningson	October 4	1008
Rudolph Sweningson	October 4	1009
Lloyd Mills	October 11	1026

These employees were therefore ineligible to vote in any event. There is no basis for considering them discriminatorily laid off, since the Board's contention here is that respondent had "the purpose of affecting the results of the pending election." (E.g. Board Brief 19.) Respondent is charged with a violation of § 8 (a) (3) which makes it an unfair labor practice "for an employer by discrimination in regard to hire or tenure of employment * * * to encourage or discourage membership in any labor organization." (29 USCA § 158 (a) (3).) The lay-off of these employees is patently not within the terms of the Act. It is indicative of the Board's approach in this case that it treats employees who had only been employed a few days, who were ineligible to vote and who had the least seniority, as having been discriminated against.

C. Employees Who Were Not Union Sympathizers.

Approximately fifty of the employees laid off on October 15 were nonunion according to the Trial Examiner (R. 110, 174-179). As in the case of the ineligible employees, there was no discrimination against them: they obviously were not laid off because of their union activities or sympathies since concededly they had none.

Let us recall the three elements delineated by this Court in *NLRB v. Kaiser Aluminum & Chem. Corp.*, *supra*, 217 F.2d at 368, elements which must be established to show that the discharge of an employee is discriminatory:

1. It must be shown that "the employer knew the employee was engaging in protected activity." Here, these employees were admittedly not engaged in any protected activity, so this element is not met.

2. It must be shown "that the employee was discharged because *he* had engaged in protected activity." Again, concededly none of these employees were engaged in such activity—they were not pro-union.

3. It must be shown that "the discharge had the effect of encouraging or discouraging membership in a labor organization." Nothing of the sort was shown here, or even attempted to be shown or even argued. And obviously the lay-off of these employees would not help respondent in the election.

In short, only those discriminated against because of their union sympathies or activities and not any others are entitled to relief.³⁵

D. The Board's Failure to Consider the Fact That Some Employees Would Have Been Discharged in Any Event.

We have been assuming, *arguendo*, that the lay-off was carried out in a discriminatory manner. It is clear that had it been carried out nondiscriminatorily a large number of employees would still have been laid off. The Board by ordering reinstatement with back-pay for all of the employees laid off (and, as we have just seen, even for some who were not laid off) neglected to take this into consider-

(35) E.g. *North Whittier Heights Citrus Ass'n v. NLRB* (9th Cir. 1940), 109 F.2d 76 (the employer had engaged in discriminatory rehiring practices, but only those who were not rehired because of their union activities were given relief. See 109 F.2d at 78); *NLRB v. Shedd-Brown Mfg. Co.* (7th Cir. 1954), 213 F.2d 163 (Board order partially enforced, but enforcement denied as to persons whose discharge was not due to their activities in support of the union).

ation and to make an appropriate adjustment for it. The law is settled that the Board's disregard of this matter is improper. The Court's ruling in *NLRB v. American Creosoting Co.* (5th Cir. 1943), 139 F.2d 193, 196, cert. den. 64 S. Ct. 937, is directly applicable:

"In one aspect, however, we perceive invalidity in the Board's order. The respondent is directed to give all of its discharged men back-pay from the date of discrimination to the date of reinstatement or offer of reinstatement. But the evidence is undisputed that it has not, since the strike, employed as many men as it did before, and there is no evidence that such reduction in employment was for the purpose of discriminating against the strikers. There is, on the contrary, positive evidence that reduced employment was the result of a lack of work and the installation of labor-saving devices. It is therefore established by the record, with no reasonable inference permissible otherwise, that not all of the discharged employees would have had employment had there been no discrimination. This was recognized by the trial examiner who recommended a formula for computing payment of back-pay which would take it into account. The Board, however, disregarded his recommendation and directed the reinstatement of all employees named in schedule "A" with compensation for the period they were unemployed, without regard to whether they would have been employed for that period had there been no discrimination. This directive is clearly punitive rather than compensatory, and beyond the power of the Board to make since its functions are preventative and remedial only. It has no power to exact retribution. *N.L.R.B. v. Newport News Shipbuilding & Dry Docks Co.*, *supra*."

Similarly, in *NLRB v. Carolina Mills* (4th Cir. 1951), 190 F.2d 675, 676, the court observed:

"With respect to the back pay provision of the order, we note that the Board directed that the fact be taken

into consideration that of the employees ordered reinstated some might have been discharged if the selection had been on a nondiscriminatory basis. This is, of course, correct; and, in entering any order hereafter with regard to back pay, the Board should not award back pay on account of those employees who would have been discharged if no discrimination had been practiced, but only with respect to those who can be said to have been discriminatorily discharged."

While the Board appears to argue that there would have been no lay-off at all but for respondent's alleged illegal motive, this is not only completely unsupported by the evidence (section III, *supra*) but there would have been no basis for complaint whatever if a strictly proportional percentage of union sympathizers had been retained,³⁶ for then the election results would not have been affected. Accordingly, this phase of the case should be remanded to the Board, even if the Board's contention that there was discrimination is accepted.³⁷

E. Recapitulation.

Recapitulating this phase of the case, the Board mistakenly counted the following employees as having been discriminatorily laid off:

(36) The Board's statistical argument is circuitous for such proportional retention is only possible if the employer is familiar with the union views of the employees. Where he is not—as he was not here—the chances are that there will be a departure from the mathematical norm, i.e. that the lay-off will be disproportionate one way or the other. Yet from this very fact the Board argues that because of the lack of proportionality the employer must have had knowledge and an evil motive.

(37) There is precedent in this circuit for remanding a case to the Board for reconsideration. *NLRB v. Sterling Furniture Co.* (9th Cir. 1953), 202 F.2d 41, subsequent opinion 227 F.2d 521.

1. Three employees who were not laid off at all, but who themselves testified that they quit because they could not work days (A1 and A2, *supra*).

2. Employees who worked both before and after the lay-off without interruption and who were either not laid off or immediately rehired (A3, *supra*). There was plainly no discrimination against them and they incurred no damage.

3. Employees who had quit prior to the lay-off, either by their voluntary absence or by failing to work their shift on October 15 (A4, *supra*).

4. Employees who were laid off, but who were concededly ineligible to vote in the election because they had been hired after the eligibility date (*supra*, B).

5. Employees who were laid off, but who were not union sympathizers or members (*supra*, C).

V.

THE BOARD'S CONCLUSION THAT THREE INDIVIDUALS WERE DISCRIMINATORILY DISCHARGED IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. The Discharge of Orice Storey.

Mrs. Storey, who was discharged on September 25, 1954, is alleged to have been discriminatorily discharged because of union activity. The Trial Examiner so found (R. 133). September 25, 1954, was a Saturday, and on that day the day shift worked until noon (R. 351, 352, 1153). Mrs. Storey was on the day shift (R. 334). She told her floor-lady that she was not feeling well and that she had a headache. She was given some aspirin but still claimed after taking it that she was not well and desired to check out early (R. 1153-1154). She was given permission to do so and the evidence shows that she punched her time card at 11:24 a.m. (R. 352, 1154).

Instead of going home, Mrs. Storey remained inside the cannery in the vicinity of the time clock and engaged a number of people in conversation and stood there during working time in an area which was dangerous and in which the employees were not supposed to stand. She had a group of women around her (R. 238-240, 242, 245, 316-318, 1154-1155). Martini observed her and the group of women from the cannery balcony and asked superintendent Duckworth to find out what she was doing there (R. 316-318, 758). Duckworth inquired of Mrs. Storey's floor-lady, Edna Hardin, as to whether Mrs. Storey had clocked out (R. 761, 1155). This inquiry took place as Hardin was starting up the balcony stairs and Duckworth was coming down (R. 1155). Hardin went back down to the time clock and looked at Mrs. Storey's time card. She informed Duckworth that Mrs. Storey had clocked out (R. 1155-1156). Thereupon, Duckworth related this to Martini who ordered him to tell Mrs. Storey to leave the cannery immediately (R. 761). Duckworth did this (R. 355, 758, 761, 1156). Mrs. Storey refused to leave (R. 758, 761). Duckworth informed Martini of Mrs. Storey's refusal. Duckworth was then instructed by Martini to tell Mrs. Storey to leave and never come back, which he did (R. 317-318, 758-759, 761).

If, as the Trial Examiner found, Mrs. Storey was discriminatorily discharged, this employer certainly conducted itself in a manner not consistent with such motive. Mrs. Storey was first asked to leave. At that point she was not discharged. Had respondent intended to rid itself of her because of union activity, it could have discharged her then and there. When she refused the request of the superintendent to leave, he did not discharged her. Had he wanted to do so because of union activity he could have done so then and there. Instead, he reported her reply to

the manager, who then instructed him to discharge her. Mrs. Storey was discharged because she created an admittedly hazardous situation. We will see that the Trial Examiner chose to ignore the testimony of not merely respondent's witnesses but that of the General Counsel's witnesses who on cross-examination not only admitted it was hazardous to congregate where Mrs. Storey was, but that they were aware of a rule against gathering in that area.

Earlier that week, on September 23, 1954, at about the end of the lunch hour, Mrs. Storey had gathered a large group of women around her and proceeded into the cannery with the object of talking to Martini about meeting with the Union's representatives (R. 319-321, 345-347). When the group got into the cannery they were gathered near the clock and beyond it out into the aisle where the fork lift operated in an area admittedly dangerous when the cannery was in operation (R. 245-246, 326-330, 379-380, 403, 440-442, 587-588, 747). Upon learning that Martini was busy in the cannery office, Mrs. Storey and the group remained waiting, and when the whistle blew at 12:00 o'clock signaling the time for resumption of work by the employees, she and the group did not return to their positions but remained standing in that dangerous place near the blanching tank until Martini appeared (R. 745-748, 759-760, 1134-1138). When Martini came, Mrs. Storey demanded to know whether he would meet with the union representatives to discuss recognition and a consent election. Martini informed her that he would not do so since the matter of representation was then pending before the National Labor Relations Board (R. 245-246, 321-322, 1136-1137). At the time there were apples in the flume and the machines were running and the fork lift was operating (R. 454-455, 747, 760, 1137).

Later that afternoon, Mrs. Storey was called into the cannery office just off the balcony by Martini. He sent Duckworth for her and suggested that Duckworth see to it that another employee accompany Mrs. Storey (R. 322). The reason for requesting the presence of another employee was explained by Martini. Whenever he wanted to talk to one of the women employees he deemed it better to have another woman employee present (R. 332-333). The woman who was present was Lila Layman (R. 245, 324). There is a definite and material conflict between Mrs. Storey's version of what Martini stated and Layman's version. Layman's version corroborates Martini's. Yet the Trial Examiner completely disregarded Layman's testimony, although she testified as a witness for the General Counsel, was a union adherent, served on the union committee, and was also one of those who is alleged to have been discriminatorily laid off on October 15 (R. 176, 436, 437).

In this meeting on September 23, Martini told Mrs. Storey that he admired her spirit and, among other things, he told her that he did not want her engaging in solicitation on company time; that it was perfectly all right for her to do so on her own time and that she could do it on company property (R. 324). Mrs. Storey denied that Martini made such statements to her (R. 361). Layman, however, disputes Mrs. Storey and supports Martini's version (R. 444). Martini also pointed out to her that the area where she gathered the women was very dangerous and warned her against any such recurrence (R. 245). It should be noted that although Mrs. Storey said this meeting in the cannery office lasted fifty minutes, she could not recall anything more that was said than the small portion of the conversation she gave (R. 350).

As explained by Martini, Mrs. Storey was discharged because she failed to heed his warning and gathered a group

of women around her during working time in a dangerous area (R. 238, 245). That the area was dangerous and was known to be such and that the employees were not supposed to congregate there was testified to by witnesses called on behalf of the General Counsel (R. 403, 749, 758, 759). Other witnesses also so testified (R. 1132-1134). One of the witnesses for the General Counsel testified that the group had to jump out of the way of the forklift on the September 23 occasion (R. 454-455). Mrs. Storey knew the area was a dangerous one, not only because she had been told but she also daily observed the operations of the forklift (R. 379-380).

In an effort to ascribe an anti-union motive to the discharge, the Board relies on three statements assertedly made by Martini (Board Brief 12-13). We shall see that the Board failed to consider the evidence fairly and ignored pertinent evidence.

1. The incident on the Monday following her discharge.

Assertedly on that occasion Mrs. Storey asked Martini if her work had been satisfactory and he replied: "Yes, you were a good worker, but I cannot have you talking up this union thing and agitating among the other girls and forming committees." (Board Brief 13, R. 361).

One need not be experienced in labor relations or possess the perception of a clairvoyant to know the purpose for which Mrs. Storey returned to the plant on the following Monday. Knowing that she had been fired for cause, but in an effort to build a case of alleged discrimination, and working with the charging party to that end, she returned to the plant to ask Martini why she was fired. Her version of what Martini said and that given by Martini are in conflict. (R. 361, 919).

Mrs. Storey first denied that she returned to the plant at the suggestion of the union (R. 376-377). After a number of questions in an effort to elicit the truth, she finally admitted on cross-examination she was driven to the plant on that occasion by a union agent (R. 377). She didn't "recall" that after she had finished her conversation with Martini she turned around and made a sign with her fingers to this union agent which indicated that from her standpoint she had apparently gotten what she was seeking. Although admitting she had made such a sign in the past, she could not recall having done it on this occasion. She does not deny it, she merely does not recall (*ibid*). It would stretch credulity to believe Mrs. Storey's tale that her return to the plant was not as a result of a plan or suggestion worked out with the union's representatives to attempt to build an unfair labor practice case out of her discharge. All of this evidence is ignored by the Board and the Trial Examiner.

2. The incident with Clarence Storey.

Clarence Storey's testimony on a conversation with Martini at about noon on September 25, 1954 concerning the discharge of Mrs. Storey and who was present and what was said is not only disputed by Martini, Duckworth and Bondi but is inherently implausible. He testified Martini told him to go out and fire his wife (R. 569-570). Martini testified he told Mr. Storey he had fired Mrs. Storey and that if he had any more reports about him leaving his post when he should be working, he would fire him, too (R. 925). Why would Martini order Storey to fire Mrs. Storey? Was Storey a supervisor? Was his wife subject to his supervision or direction? Was he even a straw boss? The answer to these questions is that the evidence shows Storey was only a non-supervisory employee (R. 590). He was a

dumper (R. 550). He dumped the apples from the lugs or boxes on a moving belt which carried them into the flume (R. 550, 551).

Duckworth corroborated Martini (R. 1113-1114). Bondi, Martini and Duckworth testified contrary to Clarence Storey's version, that Bondi was not present at any time during the alleged conversation (R. 1114, 970-972, 925). There is other evidence which challenges Storey's credibility. He testified that on September 23, 1954 when he was called into the cannery office for a discussion with Martini, he was on his way into the cannery to punch in at "15 minutes to 12:00" (R. 561-562). He was supposed to go back to work at that time (R. 565). He testified he did not then punch in and that he punched his time card after the noon whistle blew (R. 562, 565, 566). The noon whistle blew at 12:00 o'clock (R. 749-750, 1112-1113). His timecard shows he punched in at 11:40 a.m. on that day (R. 40, note 14).³⁸

Another factor bearing on his story was his testimony that while he was in the meeting with Martini, he heard only one whistle blow and that was the twelve noon whistle signaling the end of the lunch hour (R. 564, 586). He testified that respondent always blew two whistles, one about seven minutes before the end of the lunch period and one at the end of the period (R. 564, 589). He stands alone on this. No one else, not even the General Counsel's other witnesses, ever heard of two such whistles. The evidence is that only one whistle ever blew at the noon hour signaling the end of the lunch period. The only other whistle which blew before

(38) How does the Trial Examiner treat this discrepancy? He passes it over as of no great importance and comes to the aid of this General Counsel witness with the observation, "It is probable that Storey had finished punching in when Duckworth told him that Martini wanted to speak to him." (R. 40, note 14.) Again, we have an example of the Trial Examiner extricating a General Counsel witness from a conflict of evidence by resorting to probabilities and everything else but the evidence.

that one was the one signaling the beginning of the lunch period (R. 749-750, 1112-1113, 1116).³⁹

Significantly, Mrs. Storey testified that her husband on the day of her discharge merely told her she had been fired (R. 357).⁴⁰ This supports Martini's and Duckworth's version of the conversation with Mr. Storey. If Clarence Storey's present version were true, would it not be reasonable and logical, leaving the strong words aside, that he would have told his wife Martini wanted him to fire her rather than to tell her she had been fired? It would seem that a request or order as unusual as that one would be related by a husband to his wife, particularly where both were involved. Yet, Mrs. Storey not only does not corroborate her husband but she, in fact, contradicts him.

And still another item bearing upon Clarence Storey's story was his denial on cross-examination that on the Monday following his wife's discharge when she returned to the plant to see Martini, she came to the plant with a union representative (R. 592).⁴¹ Mrs. Storey, albeit reluctantly and only after much questioning, as we have already pointed out, admitted that she was driven to the plant by a representative of the charging party.

We have not cited all this testimony in order to ask the Court to reweigh Storey's credibility. Rather, we call attention to it in order to show how the Trial Examiner and the Board failed their duty of considering all of the evidence and resolving conflicts. We would not suggest that this Court do the work of the Board. We do urge that where the Board proceeds in such one-sided fashion, where it consistently ignores not only respondent's evidence but major inconsistencies, contradictions and untruths in the testimony

(39) The Trial Examiner ignored this evidence, too.

(40) Nothing is said about this in the Intermediate Report.

(41) Nothing is said about this in the Intermediate Report.

of its own witnesses, the Board's order is arbitrary and not entitled to enforcement. This court said quite aptly (and even before *Universal Camera*) in *NLRB v. Union Pacific Stages* (9th Cir. 1938), 99 F.2d 153, 177, a decision which is still often cited:⁴²

"It is suggested that this court should accept the findings of the Board; that contradictions, inconsistencies, and erroneous inferences are immune from criticism or attack by Section 10(e) of the Act, 49 Stat. 453, 29 U.S.C.A. § 160(e), which provides that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive.' But the courts have not construed this language as compelling the acceptance of findings arrived at by accepting part of the evidence, and totally disregarding other convincing evidence."⁴³

3. The testimony of Mounger and Schwartz.

Mounger and Schwartz testified that on the day on which Mrs. Storey was discharged they overheard Martini say in the main office of the cannery that he was "going to get rid"

(42) E.g., *NLRB v. Knickerbocker Plastic Co.* (9th Cir. 1955), 218 F.2d 917, 922; *State of Washington v. United States* (9th Cir. 1954) 214 F.2d 33; *NLRB v. Houston Chronicle Pub. Co.* (5th Cir. 1954), 211 F.2d 848, 851; *Radio Officers' Union v. NLRB* (1954), 347 U.S. 17, 58, 74 S. Ct. 323, 345 (dissent); *Universal Camera Corp. v. NLRB* (1951), 340 U.S. 474, 486, 71 S. Ct. 456, 464.

(43) Among many similar statements, see *NLRB v. A. Sartorius & Co.* (2nd Cir. 1944), 140 F.2d 203, 205: "We are mindful of the fact that if an administrative agency ignores all the evidence given by one side in a controversy and with studied design gives credence to the testimony of the other side, the findings would be arbitrary and not in accord with the legal requirement. *N. L. R. B. v. Union Pacific Stages, Inc.*, 9 Cir., 99 F.2d 153, 177; *N.L.R.B. v. Thompson Products, Inc.*, 6 Cir., 97 F.2d 13, 15."

The court in that case found that the Board carefully analyzed the evidence and that it was substantial. In the present case there is no analysis by the Board and, as we have seen, the trial examiner's report, while long and argumentative, wholly fails to consider some very pertinent evidence, inconsistencies and contradictions.

of Mrs. Storey because she talked too much about the union (R. 616, 732; Board Brief 12-13). The record shows that these witnesses were badly confused and mistaken as to the alleged event.

We should recall that Mrs. Storey was discharged before the end of the day shift which on that day, a Saturday, ended at noon (R. 122, 125). She testified that after she was discharged she went to her car and waited for her husband to complete his shift (R. 125, 355-357; Board Brief 12); this occurred shortly after 11:30 (R. 356). *After* she had left, Martini allegedly told Storey to fire his wife (R. 125)—the incident we have discussed above.

The episode that Mounger and Schwartz testified to occurred still “later that day” (Board Brief 12)—at noon, according to Mounger (R. 615); “in the afternoon,” after lunchtime, according to Schwartz (R. 730). Since Mrs. Storey had already been discharged by Martini, the statement attributed to him that he was “going to get rid” of her is patently implausible. Yet the Trial Examiner in crediting their testimony makes no comment whatever on this striking fact (R. 132-133).

In addition, neither of the two witnesses could give any reason for having been in the main office, which is itself inexplicable (R. 620-621, 738). One would expect that at least one of the two would know why they went in there, if they went in. When questioned by the Trial Examiner, Schwartz couldn’t even remember what her working hours were on Saturday (R. 741).

A striking illustration of the Board’s approach in this case is its reference to a statement by Schwartz that she asked floor-lady Edna Hardin if Storey had been discharged and why, and that Hardin replied she had and added “they couldn’t have that kind of people around that talk about the union all the time.” (Board Brief 13; R. 733). The Trial Examiner noted that Hardin denied making such a state-

ment (R. 133, 1159), but expressly refused to resolve the conflict, stating that it was not important to make a finding on it (R. 133). Yet in the Board's brief this incident is presented as fact, even though the Trial Examiner failed to find it to be a fact. This is representative of the manner in which the Board seeks to build a case by ignoring inconsistencies and conflicts and by carefully picking isolated bits of testimony out of the record. By some curious alchemy matters not even found by the Trial Examiner are transmuted into facts in the Board's brief.

In light of the foregoing, a dispassionate view of the record leads to the conclusion that the discharge of Mrs. Storey was for cause, that it was not discriminatory, and that the record fails to support the Board's contrary conclusion.

B. The Lay-off of Gloria Pate.

The Board claims that respondent discriminatorily discharged Gloria Pate on October 18, 1954 (Board Brief 37-39; R. 143). Pate testified that she attended the meeting on the afternoon of October 15, 1954 called for the purpose of notifying the employees of the lay-off and that her name was among those read by McGuire from the retention list (R. 708). She showed up on Monday, October 18, 1954, and was observed working on the inspection belt a few minutes after the shift began (R. 709, 887-888). Foreman Williams approached Pate and inquired as to what she was doing there since her name was not on the list and she was not supposed to be working (R. 709-710, 889). She said she had a time card and had punched in and further asserted that her name was read at the meeting on the previous Friday (*ibid*). Williams looked for a time card for her and did not find one. He then went up into the cannery office, checked the list and returned and told Pate that she was mistaken since her name was not on the retention list (R. 889-890).

She then insisted that she be paid for two hours although this was only some 10 minutes after the shift had started. Williams told her she would have to take that up with management (R. 890).

The Board and the Trial Examiner draw an unfavorable inference from the fact that respondent paid her for the two hours she demanded, arguing that this would not likely have been done if her name had not been read on the retention list on October 15 (Board Brief 38; R. 142). The amount involved was only \$2.00. Respondent could have refused to pay her anything. It chose instead to be charitable. Shall it then be punished for its good deed? The Board apparently thinks so; to the Board the doing of a kindness presupposes a guilty conscience.

Highly significant is the testimony of Mr. Wilson, the accountant, that following the meeting on October 15, Pate came up to him and stated she could not understand why her name was not on the list and that she needed the job (R. 1073-1074). He told her that he knew nothing about it and that she should see superintendent Duckworth (R. 1074). No denial by Pate appears in the record.

Moreover, one of the General Counsel's own witnesses disputes Pate's testimony about her name being read at the lay-off meeting. Gloria Lindsay testified on direct examination that she heard part of a conversation between Pate and Martini on the morning of October 18, 1954 and heard Pate say (R. 672):

"Well, I heard her asking him why she was laid off, that they didn't call her name on the 15th, and she comes back and they told her she wasn't supposed to be here, and she asked him why they didn't call her name on the 15th, and asked him if he didn't know why she wasn't called back on the 15th, and he said, 'I don't know,' just looked at her dumbfounded and shook his head, I don't know."

Since Lindsay's testimony was damaging to Pate's claim of discrimination and would make it exceedingly difficult for the Trial Examiner to find discrimination, the Trial Examiner solves the problem by stating he "disregards her (Lindsay's) testimony" (R. 136). Lindsay was Pate's friend (*ibid*), a staunch union supporter (R. 176), one of the alleged discriminatees (R. 181) and a Board witness (R. 663).

And what is this alleged discriminatory motive with respect to the incident that occurred on the morning of October 18? In an effort to bolster the General Counsel's contention, Pate was asked on direct examination if there was anything unusual about her attire that day. She testified in response thereto that on that morning she came to work wearing union buttons on her collar and cap (R. 709). This, according to General Counsel's theory, was supposed to be the motivating factor behind her alleged discharge that morning. Yet, earlier on direct and also on cross-examination, Pate testified that she was not dressed any differently that morning than she had been on October 15, or on a day or two prior thereto (R. 706-707, 716). On those occasions she was similarly attired and wore union buttons on the same places and they were as visible on those days as they were on the morning of October 18 (R. 716).⁴⁴

We submit that Pate in her great desire to continue working took it upon herself to show up on October 18, with the hope that she might be permitted to continue on the job. There is not an iota of evidence which supports the General Counsel's claim or the Trial Examiner's finding that she was

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discharged because of union activity or that she was discharged at all on October 18, 1954. Her case cannot be differentiated from others involved in the lay-off of October 15.

C. The Discharge of Elsie Dickerson.

Mrs. Dickerson was discharged on October 25, 1954, and it is contended by the Board that she was discriminatorily discharged. The Trial Examiner so found (R. 159). This contention is based upon the theory that respondent knew she had served as a union observer at the election held about a week before her discharge and fired her because of her union sympathies.⁴⁵ Such conclusion could only be reached from an imagination run rampant and not from any evidence which finds support in the record.

Dickerson was working on the slicing machines and had done so through most of the 1954 season (R. 649). She had signed a union pledge card during the course of the season and long prior to the lay-off of the night shift (R. 626). She also wore a union button at work where it was plainly visible. This was before the lay-off (R. 628-629, 649). She was not laid off. She was retained for the single shift (R. 649).

A couple of days prior to October 25, 1954, in the afternoon, one of the trimmers requested and obtained permission from floor-lady Herrerias to exchange places with Dickerson who wanted to trim for that afternoon (R. 481). Dickerson had worked as a trimmer earlier in the season (R. 625, 649). A little later that afternoon, the first inspector on the inspection belt, Virginia Chicano, observed a number of peeled and good sized apples coming down off the

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trim belt which were rather unusual in condition (R. 1119, 479). Another inspector called as a witness by the General Counsel testified she noticed something "unusual" about the apples in the afternoon of October 25, 1954. She remembered one with holes in it and a core sticking out (R. 681). The only thing unusual this witness saw about the apples between October 19, 1954 and October 25, 1954, the date of Dickerson's discharge, were the apples she described (R. 691). These apples, in addition to having the core removed by the peeling machines, had an additional core hole in them at right angles to the normal core hole. In this second core hole there was a core which had been inserted and which was partially protruding (R. 633, 634-635, 681, 1119).

Inspector Chicano picked these apples up and placed them where they were subsequently seen by the floor-lady (R. 1120). The floor-lady took some of these apples and went behind the peeling machines from which point she could observe the trimmers. As she proceeded up the line she finally saw who was treating the apples in that fashion. It was Dickerson (R. 479-480). The floor-lady showed the apples to superintendent Duckworth and told him what she observed Dickerson doing (R. 480).

In the afternoon of the next working day, more apples treated in such fashion were observed (R. 481-482, 1118). Dickerson, without having prior permission, had exchanged places on that afternoon with a trimmer (R. 482, 632, 650-651). The floor-lady took a number of such apples and brought them again to the attention of the superintendent who instructed her to discharge Dickerson (R. 482, 681, 767, 1120). Since this was in the afternoon, the floor-lady suggested that she be permitted to wait until the end of the shift to do so (R. 482). At the end of the shift Dickerson was informed by her floor-lady that she was discharged and the reasons therefor (R. 482, 629-630). Dickerson admitted to

her floor-lady that she had mistreated apples as described and then turned to one of the employees and told her that she had just been discharged for "decorating an apple" (R. 630). She received her last pay-check some days later, on October 30 (R. 631). That Dickerson was discharged for cause and was aware of it, is supported by the fact that in her application for unemployment benefits made to the California Department of Employment, she gave as the cause of her discharge "decorating an apple" (R. 651-652), rather than listing the cause as "union sympathy" or "union activities."

Respondent's superintendent emphatically denied that Dickerson was discharged for mistreating only one apple or for union activity (R. 775). With equal emphasis he denied that he was asked to find an excuse to discharge her (*ibid*). Manager Martini did not learn of Dickerson's discharge until after it had occurred and he did not know beforehand that she was going to be discharged (R. 331, 332).

In an effort to make something out of nothing there was brought in vague, nebulous, confused and disputed testimony that on other occasions other employees had "decorated" apples and were not discharged. None of the testimony showed that the apples were perfect apples or of the size of those mistreated by Dickerson or that the apples had been treated in the manner in which Dickerson had treated them. Nor did the testimony show that any one employee had mistreated as many apples as Dickerson had or that any of them had ever re-inserted the core and sent them down the processing line. On the contrary, there was evidence adduced on cross-examination of witnesses called by the General Counsel that they never put a core in or treated an apple in the fashion that Dickerson did or ever saw anyone else do so (R. 368-369, 454). Chicano, the first

inspector on the inspection belt, testified that she saw at least a couple of dozen such apples on the two days in question and that she had never seen apples so treated previously nor since (R. 1119-1120). Even Mrs. Storey who was so obviously attempting to assist Dickerson and the charging party could not recall ever having seen an apple treated the way Dickerson had treated them (R. 385). The Trial Examiner makes no mention of this fact in the Intermediate Report.

The evidence showed that in the instances where other employees had decorated apples, these were generally freak apples such as undersized or oversized apples or so-called Siamese twin apples, and generally they were unpeeled (R. 644, 1143, 1146). This also is not mentioned by the Trial Examiner. In no instance was any credible evidence offered that any supervisor saw those so-called decorated apples. In fact, the witnesses produced by the General Counsel testified that the supervisors did not see such apples (R. 364, 368, 607, 690, 691). The Trial Examiner makes no mention of this evidence.

Dickerson, herself, testified that only once in a while during the time she worked for the respondent did she observe anything unusual about the apples or anything unusual in the flume, such as a glove, a real rotten apple and an apple with a ribbon on it (R. 639). The apple with the ribbon was a freak apple and Dickerson was the one who put the ribbon on it (R. 639-640, 644). When she did this she was not seen doing it nor was she heard proposing to do it by anyone representing management (R. 644). The Trial Examiner makes no mention of this. As for the glove, there was no evidence as to where it came from or how it got in the flume. It was found among unpeeled apples in the flume (R. 641). On one occasion Dickerson saw a "decorated" apple and it was an apple that had a sharp edge on it. In

other words, it was a freak apple (R. 641). The Trial Examiner does not mention this.

Ignored by him also is Dickerson's testimony that on one occasion floor-lady Hardin brought a freak apple to her and some other trimmers which Hardin had gotten down at the squirrel cage and asked whether they had put it in the water and sent it down. No one answered Hardin (R. 644). This was an attempt by Hardin to find out who was doing something she was not supposed to do. The employees knew they were not supposed to send such apples down and this is evident from their silence to Hardin's inquiry. The apple involved on that occasion was the one on which Dickerson put the ribbon without Hardin's knowledge (R. 643-644).

We submit that the contention Dickerson's discharge was motivated by her union activity is an afterthought. If, as is now asserted, she was discharged for union activity, and if she so believed, why then did she not list this on her application for unemployment benefits? She made no such contention to the California Department of Employment. Had respondent sought a pretext for discharging her, it seems logical that it would have done so on the first day that she was observed mistreating the apples. Instead, respondent, acting as any reasonable and fairminded employer would, gave her another chance. When she was discharged, it was done at the end of her shift and after she had left her post thereby saving her embarrassment in the presence of the other employees. Viewing the evidence in its totality and objectively, the conclusion is inevitable that Dickerson was discharged for cause. It is rather strange, to say the least, that Dickerson, who throughout most of the season had worked as a slicing machine operator, should have wanted to exchange jobs with a trimmer for one afternoon and that for the first time, following her appearance on the trim belt, a number of apples showed up treated in the manner hereto-

fore described. It is rather strange, too, that the second and only other occasion when this happened was when Dickerson was on the trim belt without permission.

The effect that the treatment of the apples in such fashion could have upon the quality of the respondent's product is obvious. Respondent uses as much of each apple as is usable (R. 307, S10) and by making additional holes in the apples as Dickerson did, she not only could have affected the quality of its product through the insertion of the core in such holes, but also the quantity (R. 307-309).

If discharge of an employee for such conduct as Mrs. Dickerson engaged in results in subjecting an employer to prosecution for unfair labor practices, then we have reached a point where the right of management to hire and fire for sabotage, for insubordination, for destruction of property and for incompetence or any other justifiable cause has been abolished. Dickerson does not deny having treated the apples in the manner described herein. On the contrary, she admits that she did so treat apples but attempts to minimize it by making it appear that she did it to only one apple and that what she did was no different than what others did. It is manifest that the evidence does not support her or the Board's findings.

Summary and Request for Prehearing Conference

We have discussed five principal questions:

1. Did the Board act unreasonably or arbitrarily in refusing to dismiss the proceedings after the parties had reached a settlement in 1956? We saw that the settlement was concededly fair, that it granted recognition to the union; established a continuing collective bargaining relation for the first time in the history of the industry, gave employment preference to the alleged discriminatees, and restored labor peace. The purposes of the Act have thus been full-

filled. The Board's peremptory refusal to honor the request of both respondent and the charging union to permit withdrawal of the charge or to dismiss is without rational basis.

2. Does respondent's employment application form interfere with, restrain, or coerce employees in violation of section 8(a)(1) of the Act? We saw that it clearly does not; that there is no evidence whatever that the form was intended or interpreted as calling for disclosure of union membership or that its use caused any actual interference, restraint or coercion. We saw that it is a form widely used throughout the industry. The Board's sole reason for finding a violation of the Act was the asserted "context of hostility" against unions in the year before the adoption of the form. The Board did not endeavor to prove any such hostility at the time the form was put into use and for over three years now respondent and the union have had a continuing relation of peaceful collective bargaining. Accordingly, the Board's determination cannot be sustained.

3. Was the lay-off of October 15, 1954, discriminatory in violation of section 8(a)(3) of the Act? We saw that the Board's finding to that effect is not supported by the record. The Board's contention that respondent shipped apples to the Co-op in order to get rid of union supporters before the election is squarely contrary to the evidence, which shows without dispute that the shipments to the Co-op were small relative to the size and condition of the crop, that respondent's own production in 1954 was substantially larger than in 1953, that even in 1953, with a much smaller and better crop, respondent had to utilize the Co-op, that respondent was a member of the Co-op, and that shipments to the Co-op began in September long before any election was scheduled. We saw further that respondent convincingly showed that it was running out of warehouse space at the time of the lay-off and that the lay-off itself was conducted fairly and

without discrimination. The Board's conclusion rests on suspicion, on the pyramiding of implausible inferences, on a persistent disregard of important evidence, on failure to resolve significant conflicts in testimony, and on an effort to shift the burden of proof to respondent. The Board's conclusion does not rest on substantial evidence.

4. Did the Board erroneously count a number of employees as having been discriminatorily laid off on October 15, 1954? We saw that according to undisputed evidence the Board mistakenly included employees (a) who were not laid off at all, but were listed for retention and quit because they could not work days; (b) who worked immediately after the lay-off without interruption and who were thus either not laid off or immediately rehired; (c) who had quit prior to the lay-off; (d) who were admittedly ineligible to vote because they had been hired after the eligibility date; and (e) who were not union sympathizers or members, and thus not discriminated against.

5. Is the Board's conclusion that three employees were discriminatorily discharged supported by substantial evidence? We saw that the Board's findings cannot be sustained when the record is viewed as a whole and that such a view shows that Orice Storey and Elsie Dickerson were discharged for cause and clearly not for union activities, and that Gloria Pate was not discharged at all, but was included in the lay-off of October 15.

In view of the number of the issues presented by this case we respectfully request that a prehearing conference be held, in accordance with Rule 35(11) of this Court, "to consider the simplification of the issues."

We end by referring once more to the counsel of caution given by this Court in *NLRB v. Knickerbocker Plastic Co.* (9th Cir. 1955), 218 F.2d 917, 924:

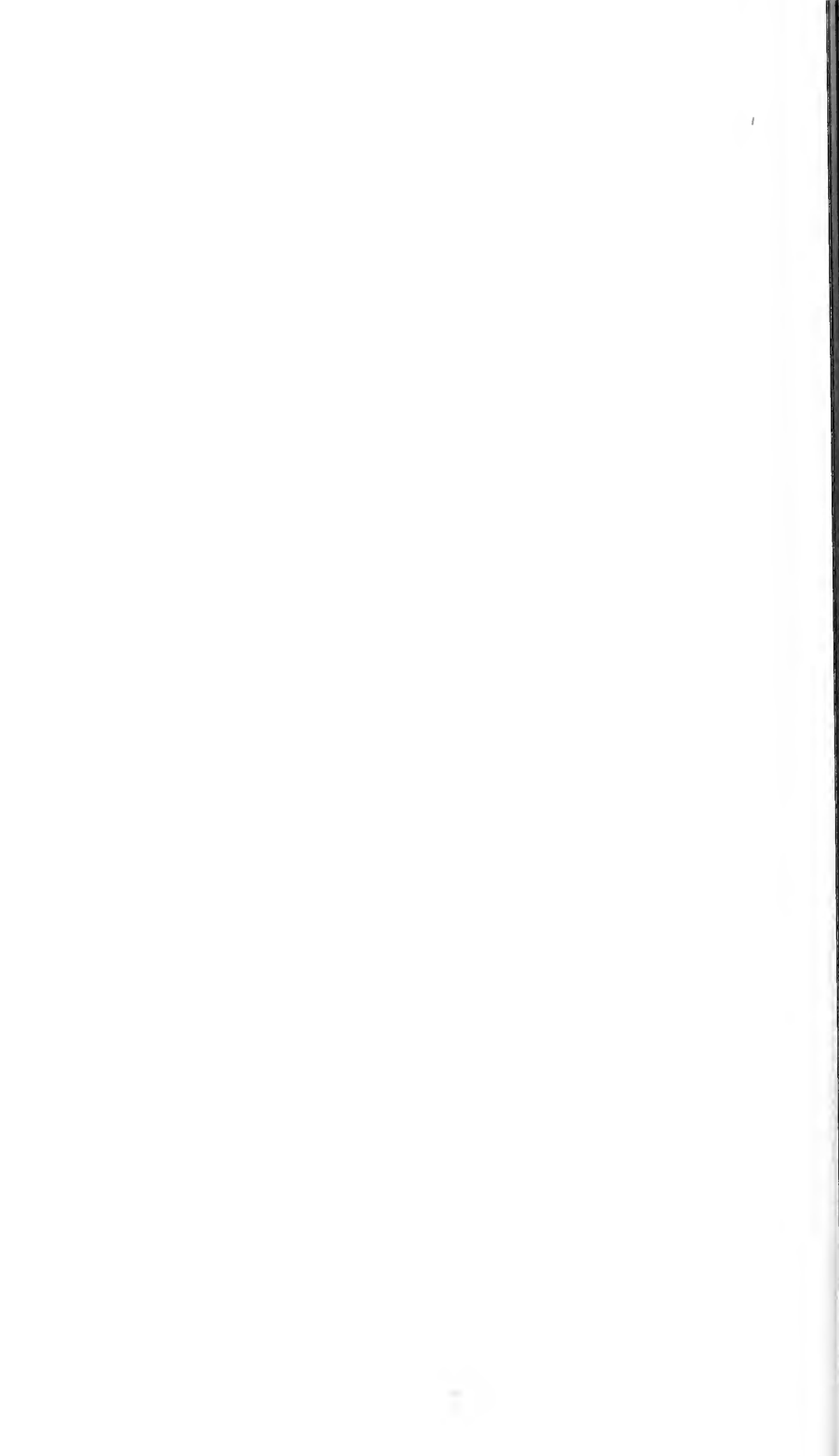
“* * * when it is considered that the fundamental purpose of the labor Act was and is to prevent disturbance of interstate commerce by labor disputes, through employer-employee agreements arrived at by employer and employees' bargaining agent, it would seem that enforcement of the Board's order should be approached with care lest the purposes of the Act be hindered rather than effectuated.”

We are confident that such care and a review of the record as a whole and of the applicable law will lead the Court to conclude that the Board's petition for enforcement must be denied, and we vigorously urge such denial forthwith so that this lengthy litigation may at last be brought to an end and peaceful collective bargaining between the parties continued without interference.

Dated: May 7, 1959.

SEVERSON, DAVIS & LARSON
NATHAN R. BERKE
GEORGE BRUNN

By NATHAN R. BERKE
Attorneys for Respondent



No. 16117

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SEBASTOPOL APPLE GROWERS UNION, RESPONDENT

**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

**REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

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FILED

MAY 30 1959

PAUL P. O'BRIEN, CLERK

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In this reply brief, we shall address ourselves to certain of respondent's arguments in connection with that phase of the case involving the mass layoff, which were not fully anticipated in our opening brief, and to respondent's contention that its agreement with the Union required the Board to dismiss the complaint.¹

¹In connection with the discharge of Elsie Dickerson, respondent complains that the Board cited "only the Trial Examiner's report, rather than evidence," to show that respondent knew Dickerson served as a union observer at the election (Res. Br., p. 61, fn. 45). The evidence supporting this finding does not appear in the printed record, but is on pages 1096 and 1097 of the typed transcript on file with the Court, as follows:

Q. (By Mr. Magor) Do you recall the election?

A. (By witness Elsie Dickerson) Yes.

Q. Can you tell us what occurred on that date, if anything?

A. Well, about—oh, five minutes before quitting time, one

I. The Board properly rejected respondent's contention that its agreement with the union required dismissal of the complaint

As shown in our main brief (p. 41, fn. 17), it is well settled that private agreements or settlements do not affect the Board's power to issue appropriate remedial orders, and that the Board's refusal to dismiss the complaint herein was within its discretion. See, in addition to decisions cited in our main brief at p. 41, *N.L.R.B. v. Walt Disney Products*, 146 F. 2d 44, 48 (C.A. 9), certiorari denied, 324 U.S. 877.

Respondent attacks the Board's refusal to consider its private settlement agreement an ample basis for dismissing the complaint principally on the grounds that: (1) "The Board did not find anything wrong with the agreement and there is not the slightest criticism of it in the Board's brief. The elements giving

of the girls standing by told me that Ella was calling my name, so I turned around to see, and she was calling my name, so I stopped over to see what she wanted, and she told me that Mr. Martini wanted to see me in the office.

Q. And, you refer to Ella, is that Ella Herrerias?

A. That is Ella Herrerias. So I went down, went outside, I was going to the office, and I saw Mr. Martini standing out there, and I asked him if he wanted to see me, and he said, "They want you over there," and he motioned toward the packing house.

Q. And what was taking place in the packing house?

A. The election.

Q. That is, the National Labor Relations Board election?

A. Yes.

Q. And did you—Strike that. Did you participate in that election?

A. Yes.

Q. And what did you do?

A. I was observer for the Teamsters.

rise to the dispute—the non-recognition of the union and the alleged discriminatory discharges—have long ago been extinguished.” (Res. Br. p. 8); and (2) “Here the remedial purposes of the Act have been concededly accomplished; the Board now seeks to punish respondent by exacting retribution (Res. Br. p. 10).” Respondent also declares that it is “undisputed that back pay was not the main interest of the employees * * * (Res. Br. p. 9, fn. 9).”

All these supporting arguments misconceive the Board’s position. To begin with, this proceeding does not involve a refusal to bargain, the unfair labor practices consisting of numerous instances of interference, restraint, and coercion in violation of Section 8(a) (1) (Bd. Br. pp. 4–9), discriminatory acceleration of the normal seasonal reduction in force and discriminatory selection of employees laid off in violation of Section 8(a) (3) and (1) (Bd. Br. pp. 9–19), and the discriminatory discharge of three Union adherents in violation of Section 8(a) (3) and (1) (Bd. Br. pp. 19–24). Recognition of the Union as bargaining representative of respondent’s employees is therefore not pertinent to remedying the unfair labor practices here committed. The Board’s order which we are seeking to enforce here provides that respondent cease and desist from the unfair labor practices found, and, affirmatively, that respondent post notices and make whole the employees for losses suffered as a result of respondent’s discrimination. Respondent, by its own admission, has failed to comply fully with either of these affirmative provisions of the Board’s order. It has not posted notices, as required, nor has it com-

plied with the back-pay provision. Although respondent asserts (Res. Br. p. 8, fn. 8) that the employees involved "have been notified," its sole support for this assertion is in the charging Union's statement to that effect in its answer to the General Counsel's opposition to respondent's motion to dismiss the complaint (R. 190-195). Respondent's further assertion to the effect that back pay "was not the main interest of the employees" is also based solely on the charging Union's opposition referred to above. Far from being "punitive," as respondent suggests, the normal back-pay remedy here is the only affirmative action required as a remedy for the widespread and flagrant discriminatory acts. That the remedy of back pay is in the public interest, rather than punitive in nature, is too well settled to require discussion. See, for example, *Phelps Dodge Corporation v. N.L.R.B.*, 313 U.S. 177, 197; *N.L.R.B. v. Talladega Cotton Factory, Inc.*, 213 F. 2d 208, 216-217 (C.A. 5). For these reasons we submit that the Board acted reasonably, and well within the scope of its discretion, in denying respondent's motion to dismiss the complaint on the basis of its private settlement with the charging party.

II. Substantial evidence on the record considered as a whole supports the Board's conclusion that respondent accelerated its seasonal layoff and selected employees for inclusion therein for anti-union reasons, thereby violating section 8(a) (3) and (1) of the act

Respondent attempts, as it did before the Board, to ascribe business reasons as motivating the October 15 layoff. As shown in our main brief, the affirmative evidence convincingly establishes that respondent de-

liberately brought about the conditions that impelled the layoff for the purpose of defeating the Union (Bd. Br. pp. 27-34). Superintendent Duckworth's admission to Unciano that apples were being shipped to Co-op for this reason is not an isolated statement, nor, as respondent suggests (Res. Br. pp. 18-19), is it the sole evidentiary support for the Board's conclusion. Forming a prelude to this admission are respondent's numerous acts of interference, restraint, and coercion. And Plant Manager Martini's warning to employees Pate and Lindsay that "if the plant would go Union * * * he'd close it down" (Bd. Br. p. 5), and his subsequent statement to a group of employees that "he would close the plant down rather than see it go union * * *" (Bd. Br. pp. 5-6) point up the correctness of Duckworth's statement. The disproportion of Union adherents laid off is additional support, borne out by the record, for the Board's conclusion that respondent was not motivated by business considerations, but by hostility toward and a desire to defeat the Union, in bringing about the layoff. It is only when balanced against all these factors that the Board, in assaying respondent's asserted reason, found that the shipments of apples to the Co-op were not justified.

The Board's conclusion that respondent's defense does not stand up under scrutiny is amply demonstrated by the facts of this case. Respondent does not dispute, for example, that it had enough storage space for cans in 1954; it claims rather that some of this space was not usable because of possible rusting. Yet it used this identical space in other years despite the

danger of rusting. The only change of circumstances was the advent of the Union. True, respondent could have decided that it had followed an unwise practice in this respect in other years. But the coincidence of changing its methods when it did, in the light of all the other evidence of its unlawful motivation, warranted the Board's rejection of this aspect of respondent's defense. Respondent argues that it sent some apples to Co-op in 1953, and that the proportionate increase in the amount of apples going to Co-op in 1954 was not large relative to the increased size of the apple crop in 1954. Even based on respondent's figures, the amount sent in 1954 was more than 800 percent larger than that sent in 1953. Furthermore, respondent does not take into account that all apples (155 tons) sent to Co-op in 1953 were for processing in 8-ounce cans that respondent was not equipped to handle, although conveniently ignoring that respondent also shipped apples to Co-op in July 1954 for this purpose—a shipment that the Board did not conclude was for any unlawful purpose (Bd. Br. p. 14, R. 78; 1264). Thus, insofar as shipments to Co-op were made that respondent was equipped to handle, the true proportion is none in 1953 as against 1358 tons in 1954. And, as the record shows, no apples were processed for respondent by Co-op in either of the two previous years, 1951 and 1952. Emphasizing respondent's unlawful purpose in shipping apples to Co-op are the facts that all 1358 tons were sent in the one month period from September 13 to October 15, and that respondent continued to ship apples to Co-op even after it decided that the shortage of ap-

ples required it to lay off about half its employees. Respondent's shipments to Co-op during the three days before the layoff, even though processing apples by Co-op cost more than canning them itself,² manifest respondent's determination to rid itself of a substantial number of Union members before the election. At least by October 12, respondent must have known that each ton of apples sent to Co-op meant less work for its own employees, and hence an earlier layoff, as respondent's decision on October 12 to curtail its operations was based on the fact that there were not going to be enough apples to keep two shifts active.

III. The Board properly included all employees not on respondent's retention list in its order requiring respondent to make whole discriminatorily laid off employees

Respondent contends that the Board mistakenly includes a large number of employees as discriminatorily laid off (Res. Br. pp. 39-48).³ This contention is grounded on a misconception of the Board's theory on this aspect of the case. Thus, respondent asserts that employees who were hired after October 2, the

² Respondent suggests that the Board's finding to this effect is not supported by the evidence, although, significantly it does not assert that the Board's finding is untrue (Res. Br. pp. 19-20). The record reference in our main brief (p. 15) refers to an exhibit furnished by respondent, which contains both transportation costs *and* production costs of apples processed for respondent by Co-op. Our main brief erroneously uses the figure \$1.58 as the per case cost of production at Co-op; the correct figure, as shown by the record, is \$1.50.

³ As the Board did not order reinstatement (R. 160-170, 200), respondent's statement that "... inclusion of these employees among those who are ordered reinstated with back pay ..." (Res. Br. p. 39) is apparently an inadvertency.

eligibility date for the election, and employees who were not union sympathizers, were improperly included as discriminatees; the former because their lay-off could not have been to affect the results of the election, the latter for the same reason and because "they obviously were not laid off because of their union activities or sympathies since concededly they had none" (Res. Br. p. 44). However, as our main brief demonstrates and the Board's decision makes clear, but for the unlawful layoff all these employees, as well as others respondent categorizes as improperly included,⁴ would have continued to work. Granting the Board's position that the layoff itself was discriminatorily motivated, it is immaterial, therefore, that the effectuation of respondent's unlawful purpose included employees who were not eligible to vote in the impending election or who were not shown to be Union sympathizers.

The other groups that respondent asserts were mistakenly included are all employees whose names were not on the retention list. As to those subsequently rehired, who may have lost little or no pay, the Board will, of course, at the compliance stage of this proceeding, determine the amount of back pay, if any, accruing. *N.L.R.B. v. Waterfront Employees of Washington*, 211 F. 2d 946, 953 (C.A. 9); *N.L.R.B. v. Venetian*

⁴ For example, some employees were on respondent's retention list but did not continue to work because they were unable to work on the day shift. Although not technically laid off, this group of employees, like the ineligible and those who were not Union sympathizers, would have been employed for some time after October 15 had respondent not accelerated its production by use of the Co-op and prematurely shut down one shift.

Blind Workers' Local 2565, 207 F. 2d 124, 126 (C.A. 9); *N.L.R.B. v. Stilley Plywood Company, Inc.*, 199 F. 2d 319 (C.A. 4). Similarly, should the facts show that any employee was not available for employment by reason of illness or for any other reason, such employee would receive no back pay. In short, the Board has made no determination as to which employees shall receive back pay, or in what amounts they shall receive it. The Board's order requires that the employees not on the retention list, as well as the three employees whose discriminatory discharges were not related to the mass layoff, be "made whole."

One final category of employees, as to whom the reasons advanced herein are generally applicable, requires additional comment. These are the approximately eight employees who, after the meeting at which the layoff was announced, failed to continue working. Respondent contends that they quit and therefore were not "laid off" (Res. Br. p. 43). As the so-called "quitting" was itself a direct consequence of the discriminatory layoff, it is clear that these employees would have continued to work but for respondent's unlawful actions. The record suggests that there was some confusion at the meeting announcing the layoff as to whether or not employees should continue to work that evening's shift (R. 161-167). Even if there had been no confusion,⁵ these employees had

⁵ Superintendent Duckworth testified, for example, that one employee, Breuer, left immediately after the meeting, saying "If I'm not going to work any more this year I may as well just quit right now" (R. 166). The Trial Examiner did not base any finding on this testimony.

been told that they were not to report for work the next work day, October 18, and were clearly laid off.

CONCLUSION

For the foregoing reasons and those stated in the Board's opening brief, it is respectfully submitted that a decree should be entered enforcing the Board's order in full.

JEROME D. FENTON,
General Counsel,
THOMAS J. McDERMOTT,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
MELVIN J. WELLES,
Attorney,
National Labor Relations Board.

MAY 1959.

No. 16119 ✓

United States
Court of Appeals
for the Ninth Circuit

UNION OIL COMPANY OF CALIFORNIA, a
corporation and D. W. CLARK, Appellants,

vs.

MURRAY D. AGATE, Trustee in Bankruptcy of
the Estates of Alton C. Simmons, Cecelia Mae
Simmons, Alvin L. Simmons, Oda Jane Sim-
mons and Lawrence W. Simmons, individually
and as co-partners dba Alpine Lodge, bank-
rupts, Appellee.

Transcript of Record

Appeals from the United States District Court
for the District of Oregon

FILED

NOV 21 1958

PAUL P. O'BRIEN; CLERK

No. 16119

United States
Court of Appeals
for the Ninth Circuit

UNION OIL COMPANY OF CALIFORNIA, a
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Transcript of Record

Appeals from the United States District Court
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Attorneys for Appellee.

In the United States District Court
for the District of Oregon

Civil No. 8724

MURRAY D. AGATE, Trustee in Bankruptcy of
the Estates of ALTON C. SIMMONS, CECE-
LIA MAE SIMMONS, ALVIN L. SIM-
MONS, ODA JANE SIMMONS and LAW-
RENCE W. SIMMONS, individually and
as co-partners, dba ALPINE LODGE,
Plaintiffs,

vs.

D. W. CLARK and UNION OIL COMPANY OF
CALIFORNIA, a corporation, Defendant.

MEMORANDUM

East—Judge.

This matter came on for hearing upon the request of counsel for all the parties for a determination of a jurisdictional question presented upon certain agreed facts, as follows:

“Voluntary petitions in bankruptcy were filed as to Alton C. Simmons, Cecelia Mae Simmons, Alvin L. Simmons, Oda Jane Simmons and Lawrence W. Simmons early in August, 1954, and adjudications in bankruptcy were entered as to these petitioners on August 9 and August 10, 1954. The alleged preference occurred on a date which, for the purposes of this inquiry, we will assume to be May 1, 1954, which is within four months from the date of filing

the petitions in bankruptcy of the individuals above named. The alleged preference consisted of the payment of money which was a partnership asset of Alpine Lodge, a co-partnership consisting of some or all of the above-named individuals. A voluntary petition for the adjudication in bankruptcy of Alpine Lodge, a co-partnership, was filed on March 25, 1955, and based thereon said partnership was adjudicated a bankrupt on March 28, 1955."

Counsel has stated the question involved under the foregoing agreed facts as being whether the alleged preference occurred within four months before the filing of the petition in bankruptcy of the transferor, bankrupt, Alpine Lodge, a co-partnership, as required by Sec. 60 of the Bankruptcy Act, Title 11, U.S.C.A. Sec. 96.

It is apparent from the agreed facts that more than four months did expire between the date of the alleged preference and the filing of a petition in bankruptcy by the mentioned co-partnership. The legal question presented is better stated as whether or not the alleged preference occurred within four months before the co-partnership was in fact and in law adjudged a bankrupt.

This opinion does not deal with the question as to whether or not the alleged transfer was a preference within the meaning of the Bankruptcy Act and that question is reserved.

The question is answered by reaching a determination of the full effect of the 1938 amendment of Sec. 5(i) of the Bankruptcy Act of 1898. It is ap-

parent that prior to the amendment of 1938 the so-called "entity doctrine" of a co-partnership was followed and thereby made a distinction from the entity of the individual co-partners.

Following the 1938 amendment, Sec. 5(i) of the Bankruptcy Act provided:

"Where all the general partners are adjudged bankrupt, the partnership shall also be adjudged bankrupt."

Collier, in his work — 1 Collier on Bankruptcy, 741, Sec. 5.36, says, in substance, that pre-1938 cases interpreting the Act in the light of the co-partnership entity doctrine held that the partnership was not to be adjudged bankrupt except upon its petition even though all the general partners had been adjudicated, and concludes that that authority was no longer controlling in view of Sec. 5(i), *supra*.

Without further belaboring the matter, Collier, in his work, again, in Vol. 1, commencing on page 685, concludes:

"Where all the general partners are individually adjudicated, the partnership entity itself, without further petition, is also adjudicated bankrupt."

To hold otherwise would do violence to the plain and clear wording of Sec. 5(i), *supra*.

The Court further concludes that the fact that the Trustee in Bankruptcy for the individuals did later file a petition on behalf of the co-partnership

in nowise changed the adjudication of the co-partnership as a bankrupt as of the final adjudication of all the co-partners. It appearing conclusively that four months had not elapsed after the date of the alleged preference and before the adjudication of all the co-partners as bankrupts, therefore, the question is answered in the affirmative that the alleged preference was made within four months before the adjudication of the co-partnership as a bankrupt.

Counsel for the plaintiff is requested to submit appropriate order.

Dated, November 20th, 1956.

[Endorsed]: Filed November 28, 1956.

[Title of District Court and Cause.]

ORDER

The parties having submitted to the court for a determination based upon the files and records in this case and the files and records in the cases of the bankrupts above named the question of the date of the filing of petitions initiating a proceeding under the Bankruptcy Act within the meaning of Section 60 of said act. It appeared to the court that Alton C. Simmons and Cecelia Mae Simmons filed voluntary petitions in bankruptcy in this court on August 9, 1954 and Alvin L. Simmons, Oda Jane Simmons and Lawrence W. Simmons filed voluntary petitions in bankruptcy in this court on August

10, 1954 and said bankrupts were adjudicated upon the dates of the filing of their petitions. Said bankrupts included all of the general partners of a co-partnership, doing business under the name of Alpine Lodge. Between March 1, 1954 and May 31, 1954 said partnership transferred certain assets to defendants herein and the plaintiff as trustee in bankruptcy of the estates of said bankrupts has attacked said transfers as preferential transfers within the meaning of Section 60 of the Bankruptcy Act. The partnership was not adjudicated a bankrupt until March 28, 1955 upon a petition filed by plaintiff as trustee on March 25, 1955. Plaintiff contends that the dates of the filing of petitions initiating proceedings under the Bankruptcy Act are August 9, 1954 and August 10, 1954 and defendants contend that said date is March 25, 1955. Counsel for the parties having submitted several written memorandums and the court being fully advised finds that the dates of the filing of petitions initiating proceedings under the Bankruptcy Act in this case are August 9 and 10, 1954.

It Is Therefore Ordered that the parties shall forthwith submit a pre-trial order herein, which said order shall recite that the court has determined that the dates of the filing of petitions initiating proceedings against the partnership herein under the Bankruptcy Act is the date that all general partners had filed their petitions seeking adjudication as bankrupts.

Done at Portland, Oregon, this 5th day of December, 1956.

/s/ WILLIAM G. EAST,
Judge.

Acknowledgment of Service and Certificate of Mailing Attached.

[Endorsed]: Filed December 5, 1956.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This cause came on regularly for pre-trial conference before the Honorable William G. East on October 29, 1956. Plaintiff was represented by Herbert H. Anderson, one of his attorneys and defendants were represented by David R. Williams of their attorneys.

During the course of the pre-trial conference the facts were agreed upon by the parties, contentions of the parties were stated, exhibits were identified and issues were framed as follows:

Agreed Facts

I.

Plaintiff is the Trustee in Bankruptcy of the following bankrupt estates:

Alton Clifton Simmons — Bankruptcy No.
B-35379

Cecelia Mae Simmons — Bankruptcy No.
B-35380

Alvin Lawrence Simmons — Bankruptcy No. B-35392

Oda Jane Simmons — Bankruptcy No. B-35393

Lawrence White Simmons—Bankruptcy No. B-35394

Alpine Lodge, a co-partnership, consisting of some or all of the individuals above named—Bankruptcy No. B-35379

Plaintiff brings this action under Section 60 of the Act of Congress relating to bankruptcy.

II.

Between the dates of March 3, 1954 and May 31, 1954, Alton Simmons, Alvin Simmons, and Lawrence W. Simmons, acting as co-partners in the firm of Alpine Lodge or Alpine Lodge and Coffee Shop, transferred certain partnership assets of said firm to D. W. Clark.

III.

As a result of said transfers, the following partnership assets were received by these defendants:

(a) Defendant Union Oil Company of California, received the sum of \$2,271.15.

(b) Defendant D. W. Clark received an account receivable from C. E. Grooms in the amount of \$229.91, and an account receivable from Oregon Film Service in the amount of \$442.24, and the sum of \$228.85.

IV.

That at the time of said transfers, defendants were creditors of the transferor, Alpine Lodge or

Alpine Lodge and Coffee Shop, a co-partnership, consisting of some or all of the above-named individual bankrupts. That the amount of \$2,271.15 was received by defendant Union Oil Company of California on account of an antecedent indebtedness, and the accounts receivable from C. E. Grooms in the amount of \$229.91 and from Oregon Film Service in the amount of \$422.24 were received by defendant D. W. Clark on account of an antecedent indebtedness.

V.

On August 9, 1954, Alton C. Simmons and Cece-lia Mae Simmons as individuals filed voluntary petitions in bankruptcy in this court and were adjudged bankrupts on said date. On August 10, 1954, Alvin L. Simmons, Oda Jane Simmons and Lawrence W. Simmons as individuals filed voluntary petitions in bankruptcy in this court and were adjudged bankrupts on said date. Said bankrupts included all of the general partners of the partnership known as Alpine Lodge.

VI.

On or about March 28, 1955, Alpine Lodge, a co-partnership was adjudged a bankrupt.

VII.

On March 25, 1955 plaintiff Murray D. Agate as Trustee in Bankruptcy of the estates of the five individual bankrupts above-named filed with Referee Lester G. Oehler the petition which is Exhibit 1.

VIII.

On April 13, 1955 the five bankrupts here involved acting as co-partners filed the petition which is Exhibit 2.

Plaintiff's Contentions

I.

Said transfers by the bankrupt partnership on May 1, 1954 were transfers of their property to or for the benefit of defendants for or on account of antecedent debts and were made or suffered by such debtors while insolvent and within four months before the filing by or against them of the petitions initiating a proceeding under the Bankruptcy Act and the effect of said transfers will be to enable such creditors to obtain a greater percentage of their debts than some other creditors of the same class.

II.

At the time said transfers were made on May 1, 1954 the bankrupts making said transfers were insolvent and the defendants or their agents acting with reference thereto then had reasonable cause to believe that the said bankrupts were insolvent.

III.

Said transfers to defendants on May 1, 1954 constituted voidable preferences and should be set aside pursuant to Section 60 of the Act of Congress relating to bankruptcy.

IV.

Plaintiff should have judgment against defendant

12 *Union Oil Company and D. W. Clark*

D. W. Clark for the sum of \$881 and against defendant Union Oil Company of California for the sum of \$2,271.15 and against both defendants for his costs and disbursements herein incurred.

V.

The following additional preferential transfers were made by the bankrupts to defendant Union Oil Company of California and should be avoided:

On April 14, 1954.....	\$221.08
On April 25, 1954.....	10.00
On April 26, 1954.....	300.36
On May 11, 1954.....	320.32

and other miscellaneous transfers.

VI.

Plaintiff is entitled to interest from November 3, 1954, the date of the trustee's demand herein.

VII.

Certain additional preferential transfers were made by the bankrupts to defendant D. W. Clark.

Contentions of Defendant, Union Oil
Company of California

I.

Denies all of plaintiff's contentions.

II.

This action cannot be maintained because the allegedly preferential transfer occurred more than

four months prior to the petition in bankruptcy of the transferor-bankrupt, Alpine Lodge, a co-partnership, which date was March 25, 1955 or April 13, 1955.

Contentions of Defendant, D. W. Clark

I.

Denies all of plaintiff's contentions.

II.

This action cannot be maintained because the allegedly preferential transfer occurred more than four months prior to the petition in bankruptcy of the transferor-bankrupt, Alpine Lodge, a co-partnership, which date was March 25, 1955 or April 13, 1955.

III.

The payment of Two Hundred Twenty-eight and 85/100 (\$228.85) Dollars received by this defendant was not a preference because it did not diminish the estate of the transferor-bankrupt, Alpine Lodge, a co-partnership. Said payment was a portion of insurance proceeds received by the transferor-bankrupt on behalf of consigned goods owned by this defendant which were destroyed by fire. Pursuant to the consignment agreement between the transferor-bankrupt and this defendant, said payment was the property of this defendant and not the property of the transferor-bankrupt.

Issues of Law

1. What was the date of the filing by or against

14 *Union Oil Company and D. W. Clark*

the bankrupt Alpine Lodge, a co-partnership, of the petitions initiating proceedings under this Act within the meaning of Section 60 of the Bankruptcy Act.

2. Should all or any part of said transfers be set aside as preferential transfers under Section 60 of the Act of Congress relating to bankruptcy?

Issues of Fact

1. At the time of said transfers, was the transferor, Alpine Lodge, a co-partnership, insolvent?

2. At the time of said transfers, did the defendants or their agents acting with reference thereto then have reasonable cause to believe that the said bankrupts were insolvent?

3. Did the transfers have the effect of diminishing the estate of the bankrupt transferor, Alpine Lodge, a co-partnership?

4. Did the transfers enable the creditor-transferees to obtain a greater percentage of their debts than other creditors of the same class?

5. Was the payment of \$228.85 received by defendant D. W. Clark pursuant to a consignment agreement whereby, in the event that said defendant's goods consigned to the transferor-bankrupt were destroyed by fire, said defendant became the owner of the proceeds of bankrupt's fire insurance applicable to said goods?

Exhibits

1. Trustee's petition filed March 25, 1955.

2. Partnership petition filed April 13, 1955.
3. Books and records of the bankrupts.
- 3-B. Check book.
- 3-C.
- 3-D. Bill of sale.
4. Records of the Clerk.
5. Records of the Referee.
6. Business records of defendant Union Oil Company of California.
7. Business records of defendant D. W. Clark.
8. Assignment of L. W. Simmons, Alton C. Simmons and Alvin L. Simmons dated April 27, 1954.
9. Bankrupts records.
10. Schedule in Bankruptcy—Mr. Simmons.
11. Schedule in Bankruptcy—Mrs. Simmons.
12.
13. Union Oil Co. statement.
14. Records of Logan.
15. Letter to Traveler's.
16. Statement.
17. Letter.
18. Letter.
20. Request for admiss.
21. Ans. Union Oil.
22. Ans. Clark.
23. Assignment.
24. A, B, C & D—Credit Reports.
25. C——
26. Statement.
27. Consignment receipts.
28. Invoices of goods destroyed.

30. A, B & C.

The parties having agreed upon the foregoing pre-trial order and having stipulated that it shall replace the pleadings herein, and shall not be amended except to prevent manifest injustice, it is hereby signed and entered this 18th day of December, 1956.

/s/ WILLIAM G. EAST,
Judge.

KOERNER, YOUNG, McCOLLOCH,
AND DEZENDORF,
/s/ HERBERT H. ANDERSON,
Attorneys for Plaintiff.

/s/ DAVID R. WILLIAMS,
Attorney for Defendants.

/s/ ARTHUR A. WILSON,
Attorney for Defendants.

Acknowledgment of Service Attached.

[Endorsed]: Filed December 18, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial before the undersigned judge of the above entitled court on December 18, 1956 and said trial continued on February 11, 1957. Plaintiff appeared in person and by his attorney Herbert H. Anderson. Defendant D. W. Clark appeared in person and by his attorney

Arthur A. Wilson. Defendant Union Oil Company of California appeared by David R. Williams, its attorney. Evidence was produced by each party, argument was made by counsel and subsequently memorandums of law were filed on behalf of each party. The court now being fully advised hereby makes and enters the following:

Findings of Fact

1. Plaintiff is the trustee in bankruptcy of the following bankrupt estates: Alton Clifton Simmons, Bankruptcy No. B-35379; Cecelia Mae Simmons, Bankruptcy No. B-35380; Alvin Lawrence Simmons, Bankruptcy No. B-35392; Oda Jane Simmons, Bankruptcy No. B-35393; Lawrence White Simmons, Bankruptcy No. B-35394; and Alpine Lodge, a co-partnership consisting of all of the above named individuals, Bankruptcy No. B-35379.

2. Plaintiff brings this action under Section 60 of the Act of Congress relating to bankruptcy.

3. In the months of April and May, 1954, Alton Clifton Simmons, Cecelia Mae Simmons, Alvin Lawrence Simmons, Oda Jane Simmons and Lawrence White Simmons were co-partners, doing business as Alpine Lodge.

4. On May 3, 1954 said partnership transferred to defendant D. W. Clark an account receivable from C. E. Grooms of the value of \$229.91 on account of an antecedent indebtedness of said partnership, which property has been converted by defendant D. W. Clark.

5. On May 3, 1954 said partnership transferred to defendant D. W. Clark an account receivable from Oregon Film Service of the value of \$422.24 on account of an antecedent indebtedness of said partnership, which property has been converted by defendant D. W. Clark.

6. On May 20, 1954 said partnership transferred to defendant D. W. Clark the sum of \$228.85 on account of an antecedent indebtedness of said partnership.

7. On May 20, 1954 said partnership transferred to defendant Union Oil Company of California the sum of \$2,271.15 on account of an antecedent indebtedness of said partnership.

8. There was no agreement by and between defendant D. W. Clark and any of the bankrupts that they would insure for his benefit any of the merchandise consigned by defendant D. W. Clark to said bankrupts.

9. Said partnership was insolvent from and after the fire which destroyed the bankrupt's service station on March 2, 1954 and at all times between May 3, 1954 and August 10, 1954 the property of said partnership was not at a fair valuation sufficient in amount to pay its debts, the property of the individual members of said partnership, after payment of their individual debts, was not at a fair valuation sufficient to make up the deficiency on the firm debts, and said partnership was insolvent within the meaning of the Bankruptcy Act.

10. Defendant D. W. Clark and defendant Union Oil Company of California, or his or its agents acting with reference thereto, had, at the time when said transfers were made, reasonable cause to believe that the assets of said partnership were insufficient to pay its debts, that the assets of the individual members of said partnership, after payment of their individual debts, were insufficient to make up the deficiency on the partnership debts, that the assets of the individual bankrupts were insufficient to pay their individual debts and that both said individual bankrupts and said partnership were insolvent within the meaning of the Bankruptcy Act.

11. At the time said transfers were made said partnership had other creditors of the same class as defendant D. W. Clark and defendant Union Oil Company of California, at the time of said transfers no payment was made to said other creditors of the same class as defendants and the effect of said transfers was to enable defendants to obtain a greater percentage of their debts than some other creditor of the same class.

12. On August 9, 1954 Alton Clifton Simmons and Cecelia Mae Simmons filed voluntary petitions in this court requesting adjudication as bankrupts and on the same day they were adjudicated bankrupts in proceedings Nos. B-35379 and B-35380 respectively.

13. On August 10, 1954, Alvin L. Simmons, Oda Jane Simmons and Lawrence W. Simmons filed

voluntary petitions in this court seeking adjudication as bankrupts and on the same day they were adjudicated bankrupts in proceedings Nos. B-35392, B-35393 and B-35394.

14. Said Alton C. Simmons, Cecelia Mae Simmons, Alvin L. Simmons, Oda Jane Simmons and Lawrence W. Simmons constituted all of the partners of said partnership known as Alpine Lodge.

15. On March 25, 1955 plaintiff filed herein a request that said partnership be adjudicated bankrupt pursuant to Section 5 (i) of the Bankruptcy Act since all of the general partners of said partnership had been adjudged bankrupts.

16. On March 31, 1955 said partnership was adjudged bankrupt pursuant to Section 5 (i) of the Bankruptcy Act.

17. All of said transfers were made from property of said partnership.

18. At the time of said transfers defendant D. W. Clark and defendant Union Oil Company of California were creditors of said partnership.

19. Each of said transfers diminished the estate of the transferor.

20. On April 27, 1954 L. W. Simmons, Alton C. Simmons and Alvin L. Simmons, sent the following letter to the Travelers Insurance Company:

“This will be your authority to pay to D. W. Clark of Riddle, Oregon, the sum of Two Thousand Five Hundred Dollars (\$2,500.00) due and

payable to the undersigned as settlement from your insurance company in settlement of a fire loss at the Alpine Lodge.”

Said letter was received by the Travelers Insurance Company in Portland, Oregon, on April 29, 1954. The Travelers Insurance Company did not pay said sum of \$2,500.00 to D. W. Clark, but instead, on May 19, 1954, drew its check in favor of the bankrupts L. W. Simmons, Alton C. Simmons and Alvin L. Simmons. Said check was mailed to the bankrupts' insurance agent at Riddle, Oregon, and on May 20, 1954, was endorsed by said bankrupts, who then caused delivery of said endorsed check to D. W. Clark on May 20, 1954, for the benefit of D. W. Clark in the amount of \$228.85 and for the benefit of Union Oil Company of California in the amount of \$2,271.15.

21. Said letter of April 27, 1954, sent to the Travelers Insurance Company by said bankrupts was not an assignment; The Travelers Insurance Company was not required to, and did not, pay said funds to D. W. Clark, and the authority contained in said letter to pay said sum to D. W. Clark could have been revoked by said bankrupts at any time.

22. The Travelers Insurance Company held said sum of \$2,500.00 subject to said bankrupts' order until it drew a check in favor of said bankrupts on May 19, 1954, and said sum was not effectively transferred to D. W. Clark until said bankrupts endorsed said check and delivered it to D. W. Clark on May 20, 1954.

ings of fact and conclusions of law herein and the court being fully advised,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff shall have and recover judgment against defendant D. W. Clark for the sum of \$974.70.

It Is Further Ordered, Adjudged and Decreed that plaintiff shall have and recover judgment against defendant Union Oil Company of California in the amount of \$2,511.54.

It Is Further Ordered that plaintiff shall have and recover judgment against defendants D. W. Clark and Union Oil Company of California for his costs and disbursements herein incurred.

May 9, 1958.

/s/ WILLIAM G. EAST,
Judge.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed May 9, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL AND ALLOWANCE
OF APPEAL

Notice is hereby given that Union Oil Company of California, a corporation, one of the defendants above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered herein on or about the 24th day of April, 1958, and from the Amended Judgment entered herein on the 9th day of May, 1958.

Dated this 23rd day of May, 1958.

WILLIAMS & ALLEY,
/s/ DAVID R. WILLIAMS,
Of Attorneys for Defendant Union
Oil Company of California.

The foregoing Appeal hereby is allowed.

Dated this 23rd day of May, 1958.

/s/ WILLIAM G. EAST,
United States District Judge.

[Endorsed]: Filed May 23, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Appellant-Defendant, Union Oil Company of California, submits the following Statement of Points upon which it intends to rely in the within Appeal:

1. The District Court erred in holding that the alleged transfers occurred within four months of the Petition initiating bankruptcy proceedings as to the Transferor-Bankrupt, Alpine Lodge, a co-partnership.

Respectfully submitted this 23rd day of May, 1958.

WILLIAMS & ALLEY,
/s/ DAVID R. WILLIAMS,

Of Attorneys for Defendant Union
Oil Company of California.

Acknowledgment of Service and Certificate of Service by Mail Attached.

[Endorsed]: Filed May 23, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that D. W. Clark, one of the defendants above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered herein on or about the 24th day of April, 1958, and from the amended judgment entered herein on the 9th day of May, 1958.

This defendant-appellant, D. W. Clark, hereby joins in the appeal heretofore filed herein by Union Oil Company of California, a corporation, defendant-appellant.

Dated this 26th day of May, 1958.

WILLIAMS & ALLEY,
/s/ DAVID R. WILLIAMS,
Of Attorneys for D. W. Clark,
Defendant-Appellant.

[Endorsed]: Filed May 26, 1958.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL
AND STATEMENT OF POINTS ON
APPEAL

Defendant-Appellant D. W. Clark hereby adopts as his designation of record on appeal that certain Designation of Record on Appeal filed herein by Defendant-Appellant Union Oil Company of California, a corporation, on or about the 23rd day of May, 1958.

Defendant-Appellant D. W. Clark hereby adopts as his statement of points upon which he intends to rely in the within appeal that certain Statement of Points on Appeal previously filed herein by Defendant-Appellant Union Oil Company of California, a corporation, on or about the 23rd day of May, 1958.

Done and Dated this 26th day of May, 1958.

WILLIAMS & ALLEY,
/s/ DAVID R. WILLIAMS,
Of Attorneys for Defendant-
Appellant D. W. Clark.

Acknowledgment of Service and Certificate of Service by Mail Attached.

[Endorsed]: Filed May 26, 1958.

[Title of District Court and Cause.]

APPELLANTS' AMENDED DESIGNATION OF RECORD ON APPEAL

Come now Defendants-Appellants Union Oil Company of California, a corporation, and D. W. Clark, and hereby designate for inclusion in the Record and Transcript on Appeal to the United States Court of Appeals for the Ninth Circuit the following which supersedes the Designation of Record on Appeal heretofore filed by these defendant-appellants:

1. Pretrial Order.
2. Memorandum Opinion dated November 20, 1956.
3. Order dated December 5, 1956.
4. Findings of Fact and Conclusions of Law.
5. Amended Judgment entered May 9, 1958.
6. The following portions of Exhibit No. 5 (Records of the Referee):
 - a. Petition (excluding Schedules) of Alton Clifton Simmons, Cecelia Mae Simmons, Lawrence W. Simmons, Oda Jane Simmons, and Alvin L. Simmons dated April 8, 1955, bearing filing stamp of Lester G. Oehler, Referee in Bankruptcy, dated April 12, 1955.
 - b. Copy of letter dated March 30, 1955, by Referee in Bankruptcy addressed to F. L. Buck, Acting Clerk, United States District Court.
 - c. The Order for Payment of Fees dated March 31, 1955, which bears filing stamp of F. L. Buck, Acting Clerk, by E. W. Davis, Deputy, dated March

31, 1955, and filing stamp of Lester G. Oehler, Referee in Bankruptcy, dated April 1, 1955.

7. Notice of Appeal of Defendant Union Oil Company of California.

8. Notice of Appeal of Defendant D. W. Clark.

9. Statement of Points on Appeal of Defendant Union Oil Company of California.

10. Designation of Record on Appeal and Statement of Points on Appeal of Defendant D. W. Clark.

11. This Amended Designation of Record on Appeal.

Done and Dated This 22nd day of July, 1958.

/s/ DAVID R. WILLIAMS,

Of Attorneys for Defendants-Appellants Union Oil Company of California and D. W. Clark.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 22, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Memorandum of Judge William G. East; Order to submit pre-trial order; Pre-trial order; Findings of fact and conclusions of law; Judgment; Amended judg-

ment; Notice of appeal of Union Oil Company of California; Undertaking for costs on appeal and supersedeas bond; Statement of points on appeal; Notice of appeal of D. W. Clark; Designation of record on appeal and statement of points on appeal; Undertaking for costs on appeal and supersedeas bond; Motion for extension of time for docketing appeal; Order extending time for filing record on appeal and docketing appeal; Appellants' amended designation of record on appeal; Stipulation re forwarding exhibits to Court of Appeals; Order to forward exhibits to Court of Appeals; Amended designation by appellee of additional portions of record; and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 8724, in which D. W. Clark and Union Oil Company of California are the defendants and appellants and Murray D. Agate, Trustee in Bankruptcy, etc., is the plaintiff and appellee; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellants and appellee, and in accordance with the rules of this court.

I further certify that there are being forwarded under separate cover exhibits 5; 10; 11; 12; 31 and 32, also photostat copies of petition and adjudication of bankruptcy, dated March 28, 1955 and photostat copies of Orders of adjudication of bankruptcy, in causes No. B-35379; B-35380; B-35392; B-35393 and B-39394.

I further certify that the cost of filing the notices of appeal, \$5.00 each has been paid by the appellants.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 28th day of July, 1958.

[Seal] R. DE MOTT
Clerk,

/s/ By THORA LUND,
Deputy.

[Endorsed]: No. 16119. United States Court of Appeals for the Ninth Circuit. Union Oil Company of California, a corporation and D. W. Clark, Appellants, vs. Murray D. Agate, Trustee in Bankruptcy of the Estates of Alton C. Simmons, Cecelia Mae Simmons, Alvin L. Simmons, Oda Jane Simmons and Lawrence W. Simmons, individually and as co-partners dba Alpine Lodge, bankrupts, Appellee. Transcript of Record. Appeals from the United States District Court for the District of Oregon.

Filed and Docketed: July 29, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16119

D. W. CLARK and UNION OIL COMPANY OF
CALIFORNIA, a corporation, Appellants,

vs.

MURRAY D. AGATE, TRUSTEE in Bankruptcy
of the Estates of ALTON C. SIMMONS, CE-
CELIA MAE SIMMONS and LAWRENCE
W. SIMMONS. individually and as co-part-
ners, dba ALPINE LODGE. Respondent.

APPELLANTS' STATEMENT OF POINTS
AND DESIGNATION OF RECORD

Appellants D. W. Clark and Union Oil Company of California, a corporation, hereby adopt in full as their Statement of Points on Appeal herein the Statement of Points on Appeal previously filed by Appellant-Defendant Union Oil Company of California with the Clerk of the United States District Court for the District of Oregon on the 23rd day of May, 1958, and

Appellants D. W. Clark and Union Oil Company of California, a corporation, hereby adopt as their Designation of Record on Appeal herein that certain Appellants' Amended Designation of Record previously filed by these appellants herein.

Done and Dated this 31st day of July, 1958.

WILLIAMS & ALLEY,

/s/ WAYNE S. ALLEY,

Of Attorneys for Appellants, Union Oil Company
of California, a corporation, and D. W. Clark.

Acknowledgment of Service Attached.

[Endorsed]: Filed August 1, 1958. Paul P.
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

ORDER

Appellee having moved the court for an order
based upon the stipulation of the parties hereto-
fore filed herein, and the court being fully advised,

It Is Hereby Ordered that the exhibits herein and
other matters designated by appellee may be omitted
from the printed record, but shall be considered by
the court as though set out in the original form in
the printed record.

Done this 11th day of August, 1958.

/s/ ALBERT LEE STEPHENS

Chief Judge, U. S. Court of Ap-
peals for the Ninth Circuit.

Certificate of Service by Mail Attached.

[Endorsed]: Filed August 11, 1958. Paul P.
O'Brien, Clerk.



COURT OF APPEALS

for the Ninth Circuit

D. W. CLARK and UNION OIL COMPANY OF
CALIFORNIA, a corporation,

Appellants,

vs.

MURRAY D. AGATE, TRUSTEE IN BANKRUPTCY
of the Estates of ALTON C. SIMMONS, CECELIA
MAE SIMMONS, ALVIN L. SIMMONS, ODA
JANE SIMMONS and LAWRENCE W. SIM-
MONS, individually and as co-partners, DBA AL-
PINE LODGE,

Appellees.

BRIEF FOR APPELLANTS

*Appeal from the United States District Court for the
District of Oregon.*

HONORABLE WILLIAM G. EAST, Judge.

WILLIAM & ALLEY,
David R. Williams,
Wayne E. Alley,
1212 Failing Building,
Portland 4, Oregon,
For Appellants.

FILED

DEC 26 1958

PAUL P. O'BRIEN, CLERK

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COURT OF APPEALS

for the Ninth Circuit

D. W. CLARK and UNION OIL COMPANY OF
CALIFORNIA, a corporation,

Appellants,

vs.

MURRAY D. AGATE, TRUSTEE IN BANKRUPTCY
of the Estates of ALTON C. SIMMONS, CECELIA
MAE SIMMONS, ALVIN L. SIMMONS, ODA
JANE SIMMONS and LAWRENCE W. SIM-
MONS, individually and as co-partners, DBA AL-
PINE LODGE,

Appellees.

BRIEF FOR APPELLANTS

*Appeal from the United States District Court for the
District of Oregon.*

HONORABLE WILLIAM G. EAST, Judge.

JURISDICTION

This is a limited appeal from an amended judgment entered by the United States District Court for the District of Oregon, sitting as a court of bankruptcy, for the recovery by a trustee in bankruptcy of a voidable preference.

Jurisdiction of the cause stems from Bankruptcy Act, § 1(10) and § 2 (11 USC § 1(10), § 11) for the District Court and from Bankruptcy Act, § 24 (11 USC § 47) for the United States Court of Appeals.

The Pre-Trial Order below (R. 8-16), which superseded the pleadings of the parties, shows the existence of the jurisdictions.

STATEMENT OF THE CASE

During the times pertinent to this cause, five persons named Simmons were co-partners, doing business as Alpine Lodge, a general partnership (R. 17). There were no other partners (R. 20).

In May 1954, the co-partnership effected four transfers, which were the subject of the purported voidable preferences. These were:

1. To D. W. Clark, May 3, 1954, an account receivable from C. E. Grooms, worth \$229.91.
2. To D. W. Clark, May 3, 1954, an account receivable from Oregon Film Service, worth \$422.24.
3. To D. W. Clark, May 20, 1954, the sum of \$228.85.
4. To Union Oil Company of California, May 20, 1954, the sum of \$2271.15 (R. 17, 18).

For purposes of this appeal only, appellants will assume the truth of certain findings of fact entered by the Court below (R. 17, 18, 19) the gist of which is that the transfers had the characteristics of voidable preferences, that each transfer was on account of an antecedent debt,

that the partnership was insolvent when each transfer was made, that the effect of the transfers was to enable the transferees to obtain greater percentages of their debts than other creditors of the same class, and that the transferees had reasonable cause to believe that the transferring partnership was insolvent when the transfers were made. These questions were litigated and decided adversely to appellants. Although not acquiescing in the truth of the findings, appellants do not wish to re-litigate those issues.

Later, two partners as individuals filed voluntary petitions in bankruptcy and were adjudicated bankrupts on the date of filing, August 9, 1954. The next day the remaining three partners as individuals filed voluntary petitions, and each was adjudicated bankrupt on that day (R. 19-20).

No petition or other document whose purpose was to bring firm assets under the Court's jurisdiction was filed by or against the partnership until the following spring. On March 25, 1955 the trustee of the individual Simmons' estates in bankruptcy filed a purported petition for adjudication that the partnership was bankrupt, referring therein to Bankruptcy Act, § 5i (11 USC § 23i). On March 31, 1955, came the actual adjudication that the partnership was bankrupt (R. 20).

Still later, on April 12, 1955, all the partners submitted a voluntary petition for the partnership's adjudication in bankruptcy (Ex. 5).

In 1956 the trustee of all the partners' estates and of the partnership (R. 17) sought under Bankruptcy

Act, § 60 (11 USC § 96) to recover the four transfers described above as voidable preferences. The issues and contentions were defined in Judge William G. East's Pre-Trial Order of December 18, 1956 (R. 8-16). The pre-trial conference was held upon October 29, 1956 (R. 8). One issue there discussed, and the only issue in this appeal, was this: Did the four transfers occur within the time period during which transfers may be voidable preferences as defined in Bankruptcy Act, § 60a(1) (11 USC § 96a (1)). (R. 13-14)

Addressing himself to this issue, Judge William G. East authored a Memorandum Opinion dated November 20, 1956 (R. 1-6). The issue is framed by this language taken therefrom:

"Counsel has stated the question involved under the foregoing agreed facts as being whether the alleged preference occurred within four months before the filing of the petition in bankruptcy of the transferor, bankrupt, Alpine Lodge, a co-partnership, as required by Sec. 60 of the Bankruptcy Act, Title 11, U.S.C.A. Sec. 96.

"It is apparent from the agreed facts that more than four months did expire between the date of the alleged preference and the filing of a petition in bankruptcy by the mentioned co-partnership. The legal question presented is better stated as whether or not the alleged preference occurred within four months before the co-partnership was in fact and in law adjudged a bankrupt.

* * * * *

" . . . it appearing conclusively that four months had not elapsed after the date of the alleged preference and before the adjudication of all the co-partners as bankrupts, therefore, the question is answered in the affirmative that the alleged prefer-

ence was made within four months before the adjudication of the co-partnership as a bankrupt.”

In his findings of fact and conclusions of law entered April 23, 1958, Judge East continued in his persuasion that the time-limit requirement of Bankruptcy Act, § 60a(1) (11 USC § 96a(1)) was satisfied (R. 23, Conclusion of Law 4). The transfers were held to be voidable preferences.

The transferees, appellants, for purposes of the appeal, seek only a review of the bankruptcy court's determination of that single question, whether the transfers fell within the prescribed four-months' period.

SPECIFICATION OF ERRORS

The bankruptcy court erred in concluding in its memorandum opinion of November 28, 1956, and specifically in the last paragraph thereof (R. 5-6), and in its Order of December 5, 1955 (R. 6-8), and in its Findings of Fact and Conclusions of Law of April 23, 1958, and specifically in Conclusion of Law No. 4 (R. 23) that the four purported preferential transfers were effected within the four-months' period specified by Bankruptcy Act, § 60a(1) (11 USC § 96a(1)).

SUMMARY OF ARGUMENT

The four transfers germane to this matter were partnership, not individual transfers. Bankruptcy Act, § 60a(1) (11 USC § 96a(1)) renders voidable certain transfers made within the fourth months next prior to

the filing of a petition by or against the transferor. Nothing was filed by or against the transferor until March 25, 1955 or April 12, 1955, either of which dates fall well without the four months' period.

ARGUMENT

A. Preferences effected more than four months before the filing by or against the transferor of a petition in bankruptcy are not voidable.

Part of the definition of a preference, set out in Bankruptcy Art, § 60a(1) (11 USC § 96a(1)) is:

“ . . . a transfer . . . by such debtor . . . within four months before the filing *by or against him* of the petition initiating a proceeding under this Act. . . .” (Emphasis supplied)

This fourth month period is computed from the filing of the transferor's petition, not some other petition. For instance, in a case arising from Puerto Rico, *Credito y Ahorro Ponceno v. Gorbias*, 25 F2d 817 (1st Cir., 1928), cert. denied 278 US 613, 49 S Ct 18, 73 L ed 537, the converse of the case at bar was considered. There, during the course of an exceedingly complex property security transaction between a partnership and a financing bank, the partners made individual transfers to the bank of their individual property. In bankruptcy proceedings commenced by a petition against the firm only, the District Court held these transfers to be voidable preferences. This was reversed upon appeal. Partners' individual transfers are not preferential in the partnership's bankruptcy, even though to a firm creditor. The rationale of the case is that the transferors-in-fact did

not constitute the debtor-bankrupt-transferor contemplated by Bankruptcy Act, § 60a(1). An esteemed state court concluded the same in *Tate v. Hoover*, 345 Pa 19, 26 A2d 665 (1942), cert. denied 317 US 677, 63 S Ct 159, 89 L ed 543.

In addition, states III Collier on Bankruptcy (14th Ed) 790, § 60.10:

“And the trustee of a bankrupt member of a partnership may not recover firm assets which have been transferred preferentially, the right to recover in such a case inures to the benefit of the firm (citing *Rubenstein v. Lottow*, 220 Mass 156, 107 NE 718, 16 ABR 243).”

In the case at bar, there were partnership transfers of partnership assets (R. 9, 17-18) within four months prior to the individual petitions but more than four months prior to the trustee's petition for partnership adjudication of March 25, 1955, or the partnership petition filed April 12, 1955, whichever of these two be the “petition” under Bankruptcy Act, § 60a(1).

The four month rule is inexorable. The opinion in *Gates v. First National Bank of Richmond*, 1 F2d 820 (D.C.E.D. Va, 1924), in reciting the elements of a voidable preference, commences with (1 F2d at 822):

“First, there must have been a payment within four months of bankruptcy [N.B. ‘Bankruptcy’ with reference to time, means the date the petition was filed. Bankruptcy Act, § 1(13) (11 USC § 1(13))]; this is the line of demarcation. It does not make any difference how insolvent a man may have been, or how clearly the intention to create a preference, it must have been within four months.”

Closely analogous to Bankruptcy Act, § 60, is § 67, which relates to setting aside liens obtained within four months next prior to filing of the petition. The Fifth Circuit, in *In re Louisell Lumber Co.*, 209 Fed 784 (1913), properly detected the dual purpose of the four month limitation. To be sure, that period is established so that the trustee can undo that which was done by the bankrupt; but also:

“The limitation of four months protects and preserves liens so obtained four months before the filing of the petition.” 209 Fed at 786.

It is this policy favoring the stability of transactions which lie without the prescribed four months’ period which appellants seek to invoke.

B. A partnership and its individual constituent partners are separate entities under the scheme of the Bankruptcy Act.

Bankruptcy Act, § 5 (11 USC § 23) is the principal statutory matter on partnerships in bankruptcy.

I Collier on Bankruptcy (14th Ed) 691-692, after describing the partnership as an entity distinct from the partners, continues to describe the principal consequence:

“As such legal entity, a partnership owns its property, and owes its debts, apart from the individual property of the members which it does not own and apart from the individual debts of its members which it does not owe.”

and continues on page 693:

“Although the Act of 1938 attempts to integrate more carefully the machinery for adjudication of the partners, and of the firm, and to resolve vari-

ous difficulties which arose under the Act of 1898, the entity theory has been retained as the keynote of § 5."

Although the Uniform Partnership Act is considered to reflect the aggregate rather than entity theory of partnership as a business form, the separate quality of partnership property is deeply embedded in certain of its sections. For instance, Oregon Revised Statutes 68.130(1) defines partnership property:

"All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership is partnership property."

And ORS 68.420 establishes the peculiar incidents of specific partnership property:

"NATURE OF A PARTNER'S RIGHT IN SPECIFIC PARTNERSHIP PROPERTY. (1) A partner is co-owner with his partners of specific partnership property, holding as a tenant in partnership.

"(2) The incidents of this tenancy are such that:

"(a) A partner, subject to the provisions of this chapter and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

"(b) A partner's right in specific partnership property is not assignable except in connection with the assignment of the rights of all the partners in the same property.

"(c) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership

debt the partners, or any of them or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

“(d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

“(e) A partner’s right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin.”

A tenancy in partnership is a statutory creation. Assume that a law partnership possesses an extensive library, held in such tenancy. Under the statute just set forth, any partner may possess and use the books for the business of the firm; but he cannot, except in conjunction with his fellow-partners, assign his rights in the books to the lawyer across the hall. Nor can the groceryman or other individual creditor of a partner attach or execute upon the partner’s interest in the books or the books themselves.

The alleged preferential transfers in the case at bar were partnership transfers of partnership property (R. 9, 17-18). Because of ORS 68.420, this partnership property was not available in satisfaction of individual debts by attachment or levy. Therefore, this property is akin to a corporate asset.

Appellant concedes that the entity theory’s being incorporated into the Bankruptcy Act, and into the

property sections of the Oregon version of the Uniform Partnership Law, does not in itself solve the problem on appeal. But any encroachments upon the entity theory should be considered as specific aberrations and appropriately defined in scope.

One aberration is that described in the selection from Collier, *supra*, as an attempt to integrate better the adjudication of a partnership and members of the partnership as bankrupts. This is the first sentence of Bankruptcy Act, § 5i (11 USC § 23i):

"i. Where all the general partners are adjudged bankrupt, the partnership shall also be adjudged bankrupt. In the event of one or more but not all of the general partners of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the general partner or partners not adjudged bankrupt; but such general partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit and account for the interest of the general partner or partners adjudged bankrupt."

There is nothing in this which eradicates the requirement of Bankruptcy Act, § 60a(1) that the computing of the four months' period commences with the petition of the transferor, in the case at bar, the partnership.

C. Automatic adjudication of a partnership as bankrupt does not affect the substantive requirements of Bankruptcy Act, § 60a(1) (11 USC § 96a(1)).

The Court below has concluded, based upon certain text from Collier on Bankruptcy, that, when all general partners are individually adjudicated, the partnership is

automatically adjudicated bankrupt without any further petition (R. 5).

Whether or not Bankruptcy Act, § 5i allows a partnership adjudication upon the Court's own motion under appropriate circumstances, in the case at bar, there was a partnership petition in fact. The Court never did adjudicate the partnership on its own motion. Appellants submit that the District Court's conclusion that the four months is computed from the time when the partnership "was in fact and in law adjudged a bankrupt" (R. 4) is a somewhat too violent construction of Bankruptcy Act, § 60a(1). That section has nothing to do with the date of adjudication. Where there is actually filed a partnership petition, the obvious answer to the question on appeal is that the date of its filing is the very date described in § 60a(1).

This Court, therefore, need not decide what happens when there is no partnership petition and all partners are adjudged bankrupt, for that is a more complex case not now presented. This is an appropriate case for the selection of the simple solution.

In the instant case, Bankruptcy Act, § 5i does no more than provide for a judicial declaration of the partnership status. There is nothing operative in that section relative to the various bankruptcy remedies. Bankruptcy Act, § 1(2) (11 USC § 1(2)) defines:

“ ‘Adjudication’ shall mean a decree that a person is bankrupt; . . .”

In *First National Bank of Goodland v. Pothuisje et al*, 217 Ind 1, 25 NE 2d 436, 130 ALR 1238 (1940),

the Court described an adjudication in bankruptcy:

“An adjudication in bankruptcy is a judgment in rem as to the assets brought into the court and establishes the status of the debtor. It absolves the bankrupt from no agreement, terminates no contract, and discharges no liability.” 130 ALR at 1240.

Nor does adjudication sweep into the bankrupt estate transfers by the debtor, even though they may be preferential. There must still be compliance with § 60a(1). The four months must still be computed from the date of the transferor's petition.

“The whole statute must be considered and all of its parts given their obviously intended meaning and purpose. No part should be stricken down unless it be in irreconcilable conflict with the remainder.” (*Fetzer v. Johnson*, 15 F2d 145, 151 (C.C.A. Okla, 1926), cert denied 273 US 751, 47 S Ct 455, 71 L ed 873.)

It should be recalled that at common law, preferences were not considered evil. The Bankruptcy Act, like death, is the great leveler, at least for the diligent creditor. But the Act cannot be permitted to level that which lies beyond its four months' limitation.

For instance, in *In re Hall*, 27 F2d 999 (D.C.W.D. Pa, 1928), one Hill, creditor of Hall, filed an involuntary petition, alleging that Hall's creditors numbered less than twelve. The referee discovered eighteen creditors, but initially excluded three relatives and one fully secured creditor from the counting list pursuant to the Act. That left fourteen. Next the zealous referee excluded three more creditors: An \$8.00 room rent creditor, a \$5.00 cigar creditor, and a \$20.00 board creditor. The ref-

eree justified these latter exclusions by concluding that the spirit of the Act did not allow the inclusion among the twelve counting creditors of persons with small current accounts. He was reversed, as the District Court dismissed the petition, following the Act as it prescribes that one creditor can file an involuntary petition only when the total is less than twelve. The opinion, at page 1000, states:

“In view of the facts developed, we have been somewhat reluctant in arriving at our conclusion that the petition must be dismissed. The dismissal seems to us to be in direct opposition to the spirit of the Bankruptcy Act, which seeks an equitable distribution of an insolvent’s estate among his creditors. To sustain the exceptions to the referee’s report means that the entire estate will be taken by two creditors—one of them the mother of the debtor—to the exclusion of other creditors of equal degree. . . . However, it is not our duty to allow the direct letter of the Bankruptcy Act to be overthrown by our conception of the spirit of that Act. . . .”

In the instant case, the direct letter of the Act is entirely supportive of appellants’ position. Nor is the spirit violated by upholding a transfer as being too remote from the date of filing.

CONCLUSION

Appellants urge to this Court that Bankruptcy Act, § 60a(1) is a statute whose application is essentially mechanical, and that the mechanics of that section require a conclusion that the purported preferential transfers in issue occurred prior to the period established by the Act.

Respectfully submitted,

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Wayne E. Alley,

1212 Failing Building,
Portland 4, Oregon,

For Appellants.

No. 16119

In the

United States Court of Appeals For the Ninth Circuit

D. W. CLARK and UNION OIL COMPANY
OF CALIFORNIA, a corporation,

Appellants.

vs.

MURRAY D. AGATE, Trustee in Bankruptcy
of the Estates of ALTON C. SIMMONS, CECELIA
MAE SIMMONS, ALVIN L. SIMMONS, ODA JANE
SIMMONS and LAWRENCE W. SIMMONS, indi-
vidually and as co-partners, dba ALPINE LODGE,

Appellee.

Appellee's Brief

On Appeal from the United States District Court
for the District of Oregon

Honorable WILLIAM G. EAST, *District Judge*

WILLIAMS & ALLEY
DAVID R. WILLIAMS
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Attorneys for Appellee.

FILED

FEB 11 1959

PAUL P. O'BRIEN, CLERK



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No. 16119

In the

United States Court of Appeals For the Ninth Circuit

D. W. CLARK and UNION OIL COMPANY OF CALIFORNIA,
a corporation,

Appellants,

vs.

MURRAY D. AGATE, Trustee in Bankruptcy of the Estates of
LTON C. SIMMONS, CECILIA MAE SIMMONS, ALVIN L.
SIMMONS, ODA JANE SIMMONS and LAWRENCE W. SIM-
MONS, individually and as co-partners, dba ALPINE LODGE,

Appellee.

Appellee's Brief

On Appeal from the United States District Court
for the District of Oregon

Honorable WILLIAM G. EAST, *District Judge*

APPELLEE'S STATEMENT OF THE CASE

Because appellants' statement of the case is in some
pects inaccurate and argumentative, the following
statement is submitted.

On August 9, 1954 Alton C. Simmons and Cecilia Mae Simmons filed voluntary petitions in bankruptcy and were adjudicated bankrupts. On August 10, 1954 Alvin L. Simmons, Oda Jane Simmons and Lawrence W. Simmons filed voluntary petitions in bankruptcy and were adjudicated bankrupts. R. 10. Said five bankrupts constituted all of the general partners of the partnership doing business as Alpine Lodge. R. 10.

Within four months of the filing by said general partners of petitions initiating proceedings under the Bankruptcy Act the partnership made four preferential transfers (R. 17, 18) which the District Court declared voidable preferences. R. 23.

On March 25, 1955 the trustee in bankruptcy of the individual estates of the general partners, plaintiff-appellee herein, applied to the Referee for adjudication of the partnership pursuant to section 5 (i) of the Bankruptcy Act. See Exhibit 1. Pursuant to the trustee's request, an order was entered on March 31, 1955, whereby the partnership was adjudged bankrupt. R. 20.

Appellee disagrees with the statements contained at page 3 of appellants' brief reciting that no petition or other document, whose purpose was to bring firm assets under the Court's jurisdiction, was filed by or against the partnership until March 25, 1955. As will later appear in appellee's argument, the filing of the petitions

by all of the general partners did bring the partnership assets under the court's jurisdiction.

The filing of the voluntary petition by the partners for adjudication of the partnership after the partnership was already adjudicated was mere surplusage. Upon adjudication of the partnership the Referee requested that partnership schedules be filed. There was attached to said schedules a voluntary petition executed by the partners, but as stated above said voluntary petition had no effect in this proceeding and no action has ever been taken thereon.

QUESTION PRESENTED

Were the transfers here involved made within four months before the filing by or against the partnership of the petition or petitions initiating proceedings under the Bankruptcy Act?

SUMMARY OF ARGUMENT

The petitions which initiated proceedings by the partnership under the Bankruptcy Act were the individual petitions of all the general partners, and the transfers involved were made within four months before the filing of said petitions.

It clearly appears that Congress intended automatic adjudication of the partnership without further petition

where all general partners are bankrupt. In such a case, the only petitions involved are the petitions of the individual partners. Those are the petitions which, in this case, initiated proceedings by the partnership under the Bankruptcy Act. The preferential transfers were made within four months of the filing of the petitions initiating proceedings under the Bankruptcy Act and were properly held voidable preferences by the District Court.

ARGUMENT

Section 5 (i) of the Bankruptcy Act provides as follows:

“Where all the general partners are adjudged bankrupt, the partnership shall also be adjudged bankrupt.”

Section 60 a (1) of the Bankruptcy Act provides as follows:

“A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and *within four months before the filing by or against him of the petition initiating a proceeding under this Act*, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.” (Emphasis supplied)

Section 1 (24) of the Bankruptcy Act provides as follows:

“‘Petition’ shall mean a document filed in a court of bankruptcy or with a clerk thereof *initiating a proceeding under this Act.*”

The definition now contained in Section 1 (24) of the Bankruptcy Act was last amended by Public Law 456 approved July 7, 1952. The reasons for this amendment are stated in House Report No. 2320 on S. 2234, 82nd Congress, Second Session (1952) 3 as follows:

“The present definition is not comprehensive, and is awkward. It now means a voluntary or involuntary petition initiating an ordinary bankruptcy proceeding and does not include the ‘original’ petition under the debtor relief chapters. It should mean whichever petition first invoked the benefits of the act, either the ordinary bankruptcy petition or the original petition under a debtor relief chapter. The definition contained in the bill also avoids the cumbersome reference in several sections of the act, to ‘the petition in bankruptcy or the original petition under’ the recited debtor relief chapter. Thus, where as in Section 67, the time period is to be computed with reference to the date of the filing of the petition, it is the first petition which invokes the benefits of the act, namely, the ordinary bankruptcy petition or the ‘original’ debtor relief petition, as the case may be.”

mative authority for the administration of the partnership estate where proceedings are instituted against all the partners as individuals. However, the Act of 1938 has supplemented the old section by specifically providing that where all the general partners have been individually adjudged bankrupt, the partnership shall also be adjudged bankrupt. Under this additional provision, therefore, *the partnership property will necessarily be administered in the bankruptcy court whenever all the general partners have been individually adjudicated bankrupt.*" (Emphasis supplied)

It appears that Collier is firmly of the opinion that where all partners are adjudicated bankrupt, no further petition is required and the partnership will be adjudicated without further petition. If the partnership is adjudicated without further petition, then it is obvious that petitions initiating proceedings under the Bankruptcy Act are the petitions of the individual partners.

Clearly expressed legislative intent that when all general partners are adjudicated bankrupt, *the partnership shall be adjudicated without further petition* is found in House Report No. 1409 on H. R. 8046, 75th Congress, First Session (1937) at page 35 where the following appears:

"9. Amendments to Provide a More Workable Partnership Section.

"The principal new provisions in this connection are that * * *

"(c) Where all general partners are individually adjudicated, the partnership entity itself, *without further petition*, is also adjudged bankrupt."

* * *

"(c) Automatic Adjudication of Partnership.

"Section 5 (i). Where all general partners are individually adjudged bankrupt, the partnership entity itself, *without further petition*, is also adjudged bankrupt." (Emphasis supplied)

The same legislative intent is clearly expressed in Senate Report No. 1916 on H. R. 8046, 75th Congress, Third Session (1938) where the following appears at p. 12:

"Where all general partners are individually adjudicated, the partnership entity itself, *without further petition*, may also be adjudged bankrupt." (Emphasis supplied)

The following appears in Weinstein, The Amenda-
tory Bill in the Present Congress, 11 Journal of the
National Association of Referees in Bankruptcy 63, 64
(January, 1937):

"The new § 5 also provides that where all the general partners are individually adjudged bankrupts, the partnership itself shall be adjudged a bankrupt

without the necessity of a separate petition for that purpose. The reason for this change is obvious."

All authorities seem to agree that no further or separate petition for adjudication of the partnership is required where all general partners are adjudged bankrupt. What then is the petition which initiates proceedings under the Bankruptcy Act by the partnership? The only logical answer is that it is the last petition filed by a general partner. On that date all of the partners' interests in the partnership passes into the bankruptcy court and the partnership is in a position to be adjudicated bankrupt *without further petition*.

Appellants argue at pages 8 and 9 of their brief that under the Bankruptcy Act of 1938 the partnership is considered an entity separate and apart from the members of the partnership. Appellants cite 1 Collier on Bankruptcy, 14th Ed., pps. 691, 692 and 693. But appellants failed to note that the entity theory is not applied completely and that Section 5 (i) represents a departure from strict application of the entity theory. At 1 Collier on Bankruptcy, 14th Ed., p. 707 the following appears:

"It is obvious that subdivision *i* represents a departure from the strict application of the entity theory, for adherence to that theory would require that the partnership be the subject of a separate petition having all the requisites of a petition in bankruptcy

without regard to the bankruptcy of the partners as individuals.”

Appellants argue at page 12 of their brief that there was no automatic adjudication in this case because “there was a partnership petition in fact”. Presumably, appellants mean by their reference to the partnership petition the request filed by the trustee for adjudication of the partnership under Section 5 (i) on the grounds that all general partners were bankrupt, Exhibit 1 herein. But said application filed by the trustee was not a petition initiating a proceeding under the Bankruptcy Act. The Bankruptcy Act contemplates voluntary petitions and involuntary petitions. Voluntary petitions are filed by debtors and involuntary petitions are filed by creditors. The trustee in bankruptcy of the individual estates of the general partners was neither a representative of the partnership qualified to file a voluntary petition, nor was he a creditor of the partnership qualified to file an involuntary petition under Section 59 of the Bankruptcy Act. The application by the trustee was merely a request that the Referee perform the duty imposed upon him by Section 5 (i) of the Bankruptcy Act, that is to adjudge the partnership bankrupt “where all general partners are adjudged bankrupt”.

Appellants argue at pages 9 and 10 of their brief that the partnership property was not available in satisfaction of the individual debts of the partners. This, of course, has no bearing upon the instant case, as appellants seem to concede at the top of page 11 of their brief, but in any event all of the property of the general partners was swept into bankruptcy court when all of the general partners became bankrupt. As is observed at 1 Collier on Bankruptcy, 14th Ed., p. 743:

“ * * * the partnership property will necessarily be administered in the bankruptcy court whenever all the general partners have been individually adjudicated bankrupt.”

The following appears as a comment upon Section 5 (i) of the Bankruptcy Act in Weinstein, *The Bankruptcy Law of 1938* (1938) at p. 27:

“This was subd. g of the old Act and has been retained unchanged, except for the additional provision that, upon all general partners being adjudged bankrupt, the partnership shall also be so adjudged. Since all the general partners are in bankruptcy, and thus their several estates are being administered by the bankruptcy court, and since the total of their interests in the partnership constitutes the partnership, not only is the partnership property necessarily drawn into the proceeding, but it is only logical and proper that the partnership itself should also be adjudged bankrupt.”

It should be noted that appellants have cited not one case, text or congressional report supporting their position. While there seem to be no cases on this point, appellee's position is supported by Collier on Bankruptcy and the Congressional Committee Reports.

CONCLUSION

The clearly expressed legislative intent is that where all general partners are adjudged bankrupt, the partnership shall also be adjudged bankrupt without further petition. It is obvious that the individual petitions of the general partners are the petitions initiating proceedings under the Bankruptcy Act where all general partners are bankrupt. Preferential transfers were made by the partnership within four months of the filing of said petitions initiating proceedings under the Bankruptcy Act and were properly avoided by the District Court. The judgment of the District Court should be affirmed.

Respectfully submitted,

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United States
COURT OF APPEALS
for the Ninth Circuit

D. W. CLARK and UNION OIL COMPANY OF
CALIFORNIA, a corporation,

Appellants,

vs.

MURRAY D. AGATE, TRUSTEE IN BANKRUPTCY
of the Estates of ALTON C. SIMMONS, CECELIA
MAE SIMMONS, ALVIN L. SIMMONS, ODA
JANE SIMMONS and LAWRENCE W. SIM-
MONS, individually and as co-partners, DBA AL-
PINE LODGE,

Appellees.

APPELLANT'S REPLY BRIEF

*Appeal from the United States District Court for the
District of Oregon.*

HONORABLE WILLIAM G. EAST, Judge.

FILED

MAR 27 1959

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NO. 16119

United States
COURT OF APPEALS
for the Ninth Circuit

D. W. CLARK and UNION OIL COMPANY OF
CALIFORNIA, a corporation,

Appellants,

vs.

MURRAY D. AGATE, TRUSTEE IN BANKRUPTCY
of the Estates of ALTON C. SIMMONS, CECELIA
MAE SIMMONS, ALVIN L. SIMMONS, ODA
JANE SIMMONS and LAWRENCE W. SIM-
MONS, individually and as co-partners, DBA AL-
PINE LODGE,

Appellees.

APPELLANT'S REPLY BRIEF

*Appeal from the United States District Court for the
District of Oregon.*

HONORABLE WILLIAM G. EAST, Judge.

INTRODUCTORY

Appellee's statement of the case is principally an argument that the two petitions actually filed for adjudication of the transferor-bankrupt should not be considered in determining the "four months'" period. In

this Act.' This provision clarifies the language of the former statute, and, in addition, makes its terms applicable to corporate reorganizations, arrangements, and wage earners' plans, as well as ordinary bankruptcy. It is fundamental that the 'four months' period is an essential element of a preference, and a transfer perfected prior thereto may not be attacked as preferential, except under principles of applicable state law."

With specific reference to the 1950 change, the following quotation from Collier Bankruptcy Manual (second edition) Appendix, §60, page 86, is applicable:

"In the portion of paragraph (1) retained by the Amendment one change in language was made. The words 'in bankruptcy or of the original petition under Chapter X, XI, XII, or XIII of' were eliminated, and the words 'initiating a proceeding under' substituted so that the focal reference with regard to point of time is 'the filing by or against him of a petition initiating a proceeding under this Act.' This change is largely verbal, substituting a more inclusive and concise phrase for the former language. A 'proceeding under this Act' includes, of course, any type of proceeding dealt with by the Bankruptcy Act, and, in this respect, therefore, the change also served to make clearer the possible application of Section 60a in a proceeding such as that initiated under Section 75."

To the same effect is III Collier on Bankruptcy (14th edition), §60.06 at page 775 (paragraph (2)).

It is thus seen that while the 1938 change was one of substance, the 1950 change was a recodification of verbiage or form only. Neither change has the slightest bearing on the facts of this case, because an ordinary bankruptcy petition is here involved.

In order to apply the statute to this case, it is necessary to omit reference to petitions under Chapters X, XI, XII, and XIII. At this point a crystal clear construction of the present language "petition initiating a proceeding under this Act" appears. This language, in ordinary bankruptcy cases, is the legal equivalent of the former (1938) language "the petition in bankruptcy."

When the next question is asked: "Whose petition in bankruptcy does Section 60a(1) refer to?" the answer is equally clear. It is the petition of the transferor-bankrupt. The words "a transfer . . . by such debtor . . . within four months of the filing by or against him of the petition . . . ," leave no area of uncertainty.

Any other construction would fly in the face of the statutory history and analysis by text-writers of this section. It is noteworthy that appellee cites no authority of any kind for his radical construction of this statute.

Appellee cites Section 1 (24) of the Bankruptcy Act, ostensibly in support of his theory that some petition other than that of the transferor controls Section 60a. However, the statutory definition of a "petition" lends no support to the Trustee's theory as is demonstrated by the Congressional Report on page 5 of Appellee's Brief.

Section 1 (24) of the Act merely replaced a verbose definition which did not include a petition under Chapters X, XI, XII, and XIII of the Act. This, prior to 1952, appeared in Section 1 (20) of the Act as follows:

"'Petition' shall mean a paper filed in a court of bankruptcy with a clerk or deputy clerk by a

debtor praying for the benefits of this title, or by creditors, alleging the commission of an act of bankruptcy by a debtor therein named;"

It is also noteworthy that the congressional report cited by appellee (H.R. 2320 on S. 2234, 82nd Cong., 2nd Sess.) observes on page 4 that the change in Section 1 (24) was anticipated two years earlier in the 1950 Amendment of Section 60a of the Act.

The Conclusion is thus inescapable that the four months' period in Section 60a has reference to a petition in bankruptcy by or against the transferor of the alleged preference. The transferor in this case is admittedly a partnership on whose behalf two petitions for adjudication in bankruptcy were filed over ten months after the alleged transfers.

2. Partnership petition condition precedent to Trustee's action to recover for partnership preferential transfer.

This principle is applicable because of the inter-relationship between Sections 5(i) and Section 60a of the Act. As is pointed out in appellants' brief, we believe the law clearly requires a partnership petition for adjudication and administration of partnership assets in bankruptcy. Although there are no cases on this point, we believe the 1938 Amendment of Section 5(i) did not destroy the entity theory of partnerships in bankruptcy.

On the contrary, the effect of the 1938 Amendment was to remove two objectionable features from partnership bankruptcy law. The first was the difficulty in involuntary proceedings of proving a partnership act

of bankruptcy even though all of the individual partners had been adjudicated bankrupt. The second was the fact that in voluntary proceedings, a partnership could not be adjudicated a bankrupt without the consent of all the general partners, irrespective of the prior adjudication of all of the general partners individually. This is pointed out in *I Remington on Bankruptcy*, §57, §82, §84 and §86.

There is no question that these objectionable features have been cured by the 1938 Amendment of Section 5(i). But the Section 5(i) amendment has not repealed other sections of the Act not inconsistent therewith. Sections 5(a), (b), and (c) (providing for voluntary or involuntary petitions by or against the partners individually, as a partnership, or combined), Section 18 (requiring a partnership petition), and Section 30 (Rules, Forms and Orders, Form 4 of which sets forth the partnership petition) have not been repealed by implication.

Courts do not favor repeal of long established principles of law by implication, and the legislature will be presumed not to intend such a result unless such intention is made clearly to apply by express declaration and necessary implication (50 Am Jur, Statutes, §340 at p. 332). Where it is possible to do so, it is the duty of courts to adopt that construction of a statutory provision which harmonizes and reconciles it with other statutory provisions (50 Am Jur, Statutes, §363 at p. 367).

I Remington on Bankruptcy, §84, in discussing the

difference between a petition for adjudication of individual partners and the partnership itself states:

“But, since there is a definite distinction between the adjudication of a partnership as a firm and the individual bankruptcies of some of its members, a petition seeking partnership adjudication must be clearly directed to that end if it is to be considered for the purpose. There is no sanction for an anomalous application bearing no identifiable indications as to whether it is directed to partnership bankruptcy or to bankruptcy of some of the individual partners.”

In the instant case, there was no “anomalous application” such as Remington excoriates. There were five individual voluntary petitions, each filed on official Bankruptcy Form No. 1. Over seven months later there were two partnership petitions filed.

The first petition (Exhibit 1) was the Trustee's petition for adjudication of the partnership. As to this petition, appellee sets forth an argument on page 11 of his brief which appears both inconsistent and absurd. The Trustee claims that this petition does not qualify as a “petition initiating a proceeding under this act” (the language of §60a) because it was not an ordinary voluntary or involuntary partnership petition. Whether or not this be true, it was the first petition of any type which requested adjudication of the transferor-partnership. It would thus seem that the Trustee seeks a very narrow construction of the language of §60a in order to exclude the petition filed on March 25, 1955. At the same time the Trustee is willing to stretch the fabric of §60a to the tearing point in his

attempt to have the same language cover the individual petitions which did not seek the adjudication of the transferor-partnership.

In any case, the partnership petition filed on April 12, 1955 (a portion of Exhibit 5) qualified under any test as a normal voluntary petition seeking adjudication of the transferor-partnership. This petition was executed by all of the partners on official Bankruptcy Form No. 4, entitled "Partnership Petition." A separate filing fee was exacted for the partnership petition (Exhibit 5).

If it is possible to construe §5(i) as eliminating any requirement of a partnership petition for a partnership adjudication, the course actually followed by the appellee represents exactly the opposite construction.

However, the transferor's susceptibility to adjudication is not the legal equivalent of a petition for adjudication. Thus, even if it be true, as appellee contends, that automatic partnership adjudication is possible under §5(i) of the Act, that avails nothing unless, as a necessary corollary, §60a has been amended by implication. From the authorities previously cited, it is well recognized that amendments and repealers by implication are looked on with disfavor by courts. Particularly is this so when it is possible to construe the various sections harmoniously with each other. Assuming that a conflict exists, a harmonious construction is that, although no partnership petition is necessary under §5(i) to obtain adjudication, it is necessary if the Trustee seeks to invoke the benefits of §60a.

This is particularly true because the four months' period is a judicial prerequisite of the Trustee's cause of action. As is stated in Nadler's Law of Bankruptcy, §643 at page 573:

"The fifth factor of a voidable preference relates to the 'four months' period between the making of the transfer and the filing of the bankruptcy petition. Seemingly simple and clear is the statutory provision that the transfer must have been made 'within four months from the filing.' An otherwise voidable preference cannot be invalidated where the bankruptcy petition had been filed after the expiration of this four months' period."

Illustrative of the judicial policy favoring the stability of transactions beyond the four months' period is the case of *Dworsky vs. Alanjay Bias Binding Corporation*, 182 F.2d 803 (2 Cir. 1950). Therein it is stated:

"We do so because we think—although the Rules of Civil Procedure should be liberally construed—that to hold otherwise would amount to amending Section 3 Sub. b of the Bankruptcy Act. The statute which makes all preferences innocuous as acts of bankruptcy after four months thus recognizes the interest of the debtor in not being adjudged a bankrupt because of old transfers to creditors and that of the creditor-transferees in not having old transfers to them upset."

CONCLUSION

A transaction is not preferential unless within four months of the petition in bankruptcy of the transferor. This requirement is as jurisdictional as a statute of limitations. The record clearly shows that the challenged transfers were not within four months of the petitions in bankruptcy of the transferor-partnership, Alpine Lodge. The judgment should be reversed.

Respectfully submitted,

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No. 16124.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWARD CHARLES WOOD,

Appellant,

vs.

RICHARD C. HOY, District Director, Immigration and
Naturalization Service, United States Department of
Justice,

Appellee.

BRIEF OF APPELLEE.

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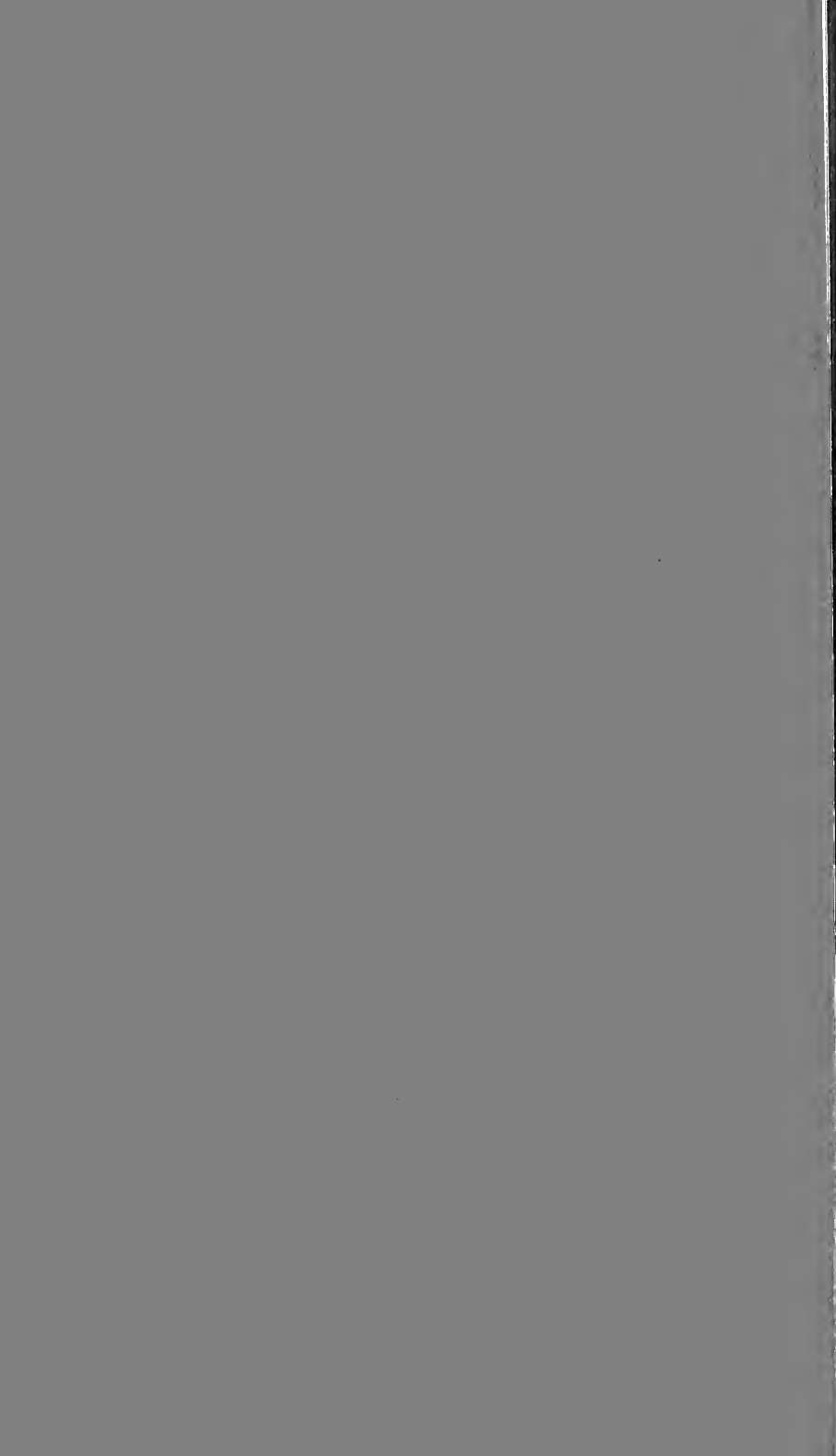
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FILED

JAN 12 1959

PAUL P. O'BRIEN, CLERK



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I.

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No. 16124.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWARD CHARLES WOOD,

Appellant,

vs.

RICHARD C. HOY, District Director, Immigration and
Naturalization Service, United States Department of
Justice,

Appellee.

BRIEF OF APPELLEE.

Jurisdiction.

The District Court had jurisdiction of the action for review of a final order of deportation pursuant to Title 28, United States Code, Section 2201, and Title 5, United States Code, Section 1009, as alleged in the complaint [R. 2].

This Court has jurisdiction to review the judgment of the District Court [R. 11-16] in favor of the defendant and against the plaintiff, and upholding the deportation order as valid, pursuant to the provisions of Title 28, United States Code, Sections 1291 and 1294(1), the judgment of the District Court being a final order.

Statutes and Regulations Involved.

Section 241(a)(4) of the Immigration and Nationality Act [8 U.S.C. 1251(a)(4)] reads as follows:

“§1251. *Deportable aliens—General classes*

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * *

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, *or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct*, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;” (emphasis supplied).

Section 211 of the California Penal Code reads as follows:

“§211. *Robbery defined*

Robbery is a felonious taking of the personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.”

Statement of the Case.

At the hearings before the Immigration and Naturalization Service the appellant was found deportable under Title 8, United States Code, Section 1251(a)(4), on a finding of conviction of “two crimes involving moral turpitude, *not* arising out of a single scheme of criminal misconduct.”

The principal question on this appeal is whether or not the two crimes of which appellant was convicted arose out of a "single scheme" or whether, as the District Court so held, they did *not* arise out of a single scheme of criminal misconduct and therefore appellant was deportable.

The second question raised in Appellant's Brief, Point One (App. Br. p. 4), is that the convictions are not final and therefore cannot be the basis for deportation, because the suspended sentence given to appellant could be modified under Section 1203.1 of the California Penal Code. The deportation statute refers to the word "conviction" and the question of what sentence is or is not imposed is immaterial and no further treatment of this point is made in this brief.

The facts, as found by the District Court, in affirming the findings of the Immigration Service are not in dispute. The Administrative File of the Immigration Service was offered in evidence and is available as an original exhibit, in this Court. This file indicates that plaintiff was convicted on July 9, 1957, in the Superior Court, Los Angeles County, after submission of the matter on the transcripts, of two counts of burglary, first degree, under Section 211 of the California Penal Code. According to Count One, on July 13, 1956, plaintiff and three others forcibly took \$100 in cash from Herbert Rosenberg. Count Two alleged that on July 16, 1956, plaintiff and two others forcibly took \$300 in cash from Eugene Charlotte, while armed with deadly weapons (2 revolvers). The appellant was sentenced for the term prescribed by law for the crimes which the judge declared to be robbery of the first degree (not less than five years according to Section 213 of the California Penal Code),

and the sentences were suspended and appellant placed on probation for five years, the terms of probation being that he serve the first six months in the County Jail and make restitution (Exhibit 2 to the Immigration File in evidence, and page 2 of the Special Inquiry Officer's decision of August 19, 1957).

ARGUMENT.

I.

The Two Crimes of Robbery Committed on July 13 and July 16, 1956, of Which Appellant Was Convicted, Did Not Arise Out of a Single Scheme of Criminal Misconduct.

There are three cases involving the question of interpretation of the words in the deportation statute under Section 1251(a)(4) "not arising out of a single scheme of criminal misconduct" which are as follows:

Khan v. Barber, 253 F. 2d 547;

Jeronimo v. Murff, 157 Fed. Supp. 808;

Miceli v. Landon, 238 F. 2d 864.

The above cases arrive at different decisions, depending upon the factual situation in each case, and it would appear that the issue involved is one largely for the individual determination of each court, case by case. The Immigration Service concluded that the crimes did not arise out of a single scheme of criminal misconduct, and the District Court in its findings and judgment [R. 15] held that the deportation proceedings were in accordance with law.

It should be noted here that the crimes occurred on different dates, July 13 and July 16; that the robbery was of different victims, at different places; that different per-

sons were involved in the carrying out of the crimes; and that different methods of procedures were used, the second crime being carried out with two revolvers.

In the *Jeronimo* case, the court denied the Government's motion for summary judgment and held that the conviction of the various counts of the indictment constituted "a single criminal plan" and that all the acts were part of "one scheme." There the two convictions which underlay the deportation action were returned during a single trial. The relationship between the conspiracy charge in Count One and the several substantive counts, taken together with the language of the concluding paragraph of the indictment which reads "all of the acts and transactions alleged in each of the several counts in this indictment are connected together and constitute parts of a common scheme and plan," was such that the very record upon which the Government had to rely to prove the convictions in turn marked them as evolving from a single scheme. There is of course no such language in the present information.

In the *Khan* case, where the alien was convicted of willfully attempting to evade the payment of federal income tax for the year 1946, and convicted in the same prosecution for committing the same offense twelve months later in connection with income tax due for 1947, the court held the convictions were *not* part of a "single scheme" within the same statute on which the appellant is here sought to be deported.

In the *Miceli* case, printed in the Federal Reporter as "*Fitzgerald v. Landon*," the offenses of which he was convicted were (1) "indecent assault and battery on Carol Litano, a child under the age of 14," and (2) "during the three months next, before the making of this complaint,

was a lewd, wanton and lascivious person in speech and behavior." In that case, the court held that the two offenses were incompatible in nature, and on that reasoning they were held to be separate and distinct offenses and not arising out of a single scheme.

While it appears that the appellant submitted the case on the record, it is clear that the presentation of different evidence was necessary to prove each of the offenses charged against the plaintiff and the others for the reasons indicated in the distinctions in the two crimes pointed out above. The fact that the two offenses followed each other closely in point of time and were of a similar character is immaterial and does not automatically make them a part of a "single scheme." The Immigration Service has reached this conclusion in many of its interim decisions.

The language in the *Khan* case, in which Judge Barnes of the Ninth Circuit wrote the opinion, is particularly applicable to this case and is as follows:

" . . . The evidence required on each count was necessarily different, and referred to acts occurring a year apart. This, alone, is persuasive that two unrelated crimes were charged. In the absence of all evidence to the contrary, complete crimes committed on differing dates or in differing places are considered separate and different crimes, and support separate charges. Could the defendant in this case urge that there was but one substantive offense charged against him, and hence that the government was required to choose for which year it desired to prosecute a defendant? Obviously not."

Conclusion.

It is respectfully submitted that the decision of the District Court, affirming the decision of the Board of Immigration Appeals that appellant is deportable, be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division,

ARLINE MARTIN,
Assistant U. S. Attorney,
Attorneys for Appellee.



No. 16125 ✓

**United States
Court of Appeals**
for the Ninth Circuit

STEPHEN GRANAT, as Administrator of the
Estate of Mary A. O'Keefe, Deceased,

Appellant,

VS.

WALTER SCHOEPSKI,

Appellee.

Transcript of Record

**Appeal from the United States District Court
for the District of Montana.**

FILED



No. 16125

United States
Court of Appeals
for the Ninth Circuit

STEPHEN GRANAT, as Administrator of the
Estate of Mary A. O'Keefe, Deceased,

Appellant,

vs.

WALTER SCHOEPSKI,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Montana.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States for the
District of Montana, Havre Division

Civil Action No. 1798

STEPHEN GRANAT, as Administrator of the
Estate of MARY A. O'KEEFE, Deceased,
Plaintiff,

vs.

WALTER SCHOEPSKI,

Defendant.

PETITION FOR REMOVAL

To the Honorable United States District Court for
the District of Montana:

Petitioner, Walter Schoepske, defendant in the
above-entitled action, respectfully represents as follows:

1. This action is a civil action for damages arising out of an automobile collision brought by Stephen Granat, as Administrator of the Estate of Mary A. O'Keefe, deceased, plaintiff, against Walter Schoepske, defendant and petitioner herein, in the District Court of the Seventeenth Judicial District of the State of Montana, in and for the County of Phillips, and is now pending in said Court.

2. This petition is filed within twenty (20) days after service of summons upon petitioner in said action and within twenty (20) days after receipt by petitioner of a copy of the complaint filed by the

plaintiff in said action, setting forth the claim for relief upon which said action is based. Attached hereto, marked Exhibit "A," and made a part hereof is a copy of said summons, and attached hereto, marked Exhibit "B" and made a part hereof is a copy of said complaint. Said summons and complaint were received by petitioner through the United States mails at Beloit, Wisconsin, on the 25th day of November, 1955, enclosed in an envelope bearing the return address of the Secretary of State of the State of Montana. No other process, pleadings, or orders have been served upon petitioner in said action.

3. The matter in controversy in said action exceeds the sum or value of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs.

Said action is between citizens of different states. Plaintiff was at the time of commencement of said action, and still is a resident and citizen of the State of Montana. Petitioner was at the time of commencement of said action and still is a citizen and resident of the State of Wisconsin.

5. Accompanying this petition and filed herewith is a bond with good and sufficient surety conditioned that the defendant will pay all costs and disbursements and incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

6. Petitioner will, upon the filing of this petition and said bond, forthwith give written notice thereof

to the above-named plaintiff and file with the Clerk of the District Court of the Seventeenth Judicial District of the State of Montana, in and for the County of Phillips, a copy of this petition, by all of which acts the above-entitled cause is removed from the District Court of the Seventeenth Judicial District of the State of Montana, in and for the County of Phillips, to the above-entitled District Court of the United States.

Wherefore, your petitioner prays that this Honorable Court assume jurisdiction of the above-entitled cause, and that said District Court of the Seventeenth Judicial District of the State of Montana shall proceed no further unless the case is remanded.

WALTER SCHOEPSKE,

By /s/ EDW. ALEXANDER,
His Duly Authorized
Attorney.

HALL, ALEXANDER &
BURTON,

By /s/ EDW. ALEXANDER,
Attorneys for Defendant.

Duly verified.

EXHIBIT B

In the District Court of the Seventeenth Judicial
District of the State of Montana in and for the
County of Phillips

No. . .

STEPHEN GRANAT, as Administrator of the
Estate of MARY A. O'KEEFE, Deceased,
Plaintiff,

vs.

WALTER SCHOEPSKI,
Defendant.

COMPLAINT

Plaintiff complains and for cause of action against
the defendant alleges:

1.

That Mary A. O'Keefe died, intestate, near Malta,
Phillips County, Montana, on August 30th, 1955.

2.

That, by an order duly given and made, in the
above-entitled Court, in the matter of the estate of
Mary A. O'Keefe, deceased, on the 23rd day of Sep-
tember, 1955, the plaintiff, Stephen Granat, was
appointed Administrator of said estate, and he fur-
nished a good and sufficient bond as ordered by the
Court, took the oath of his office and Letters of
Administration were issued to him, have not been
revoked and he continues to be the Administrator of
the estate of Mary A. O'Keefe, deceased.

3.

That, on the 30th day of August, 1955, there was, had been and continued to be a public highway, which was, is and continues to be a much-travelled highway, which was and is known as U. S. Highway Number 2, running between the cities and towns of Malta, Saco, Hinsdale and Glasgow, Montana, and easterly and westerly from said places and on the 30th day of August, 1955, at the time of the casualty hereinafter mentioned and described, said highway was a hard surfaced highway, dry and composed of black-top of a width of 22 feet from shoulder to shoulder, and, at the point of the said casualty, there was a bridge in the highway of the same width as the black top. That, approaching said bridge from the West on said highway, the bridge was visible for several hundred feet but immediately to the East of said bridge there was a rise in the highway, followed by a depression so that approaching traffic from the East of said bridge could not be seen by drivers from the West, while the vehicles were in the low part of the depression to the East of said bridge. (That at the high point to the East of said bridge there was on the north-erly side of said highway a warning sign on said day of the casualty warning drivers of vehicles going westward that there were narrow bridges in the highway to the West of said warning sign, which warning sign was plainly visible to all drivers operating their vehicles in a westerly direction approaching the aforesaid bridge where the casualty hereinafter mentioned and described occurred.) That from

said bridge, both easterly and westerly the center line of said highway was plainly marked with a white-painted line along the center of said highway. That, in the exercise of ordinary care, drivers of vehicles could pass each other in safety on said bridge.

4.

That, on the 30th day of August, 1955, Mary A. O'Keefe was driving her automobile along said highway at about the hour of 9:30 a.m. of said day; that plaintiff is informed and believes and therefore alleges that she was driving and operating said automobile in a careful and prudent manner, keeping a careful lookout ahead of her, guiding said automobile along the southerly half of said highway as she was driving easterly thereon, keeping the automobile she was driving under complete control and driving at a speed of approximately and no more than forty-five miles per hour as she approached and entered the bridge in the highway aforesaid and she continued so to drive until the collision hereinafter complained of occurred.

5.

That the day of August 30th, 1955, was clear and as plaintiff is informed and believes and therefore alleges, at the time of and before said collision, the highway immediately on each side of said bridge was free from obstruction to the view of drivers using said highway; at the time that Mary A. O'Keefe guided her automobile toward the approach and as she entered said bridge, her automobile was

in plain sight of the defendant, who was then and there coming over the high point to the East and driving in a westerly direction toward said bridge.

6.

That, at said time and place, the defendant was driving his automobile westerly from the said high point toward said bridge in a careless and negligent manner, as hereinafter explained and he guided and drove his automobile with great force and recklessness into collision with the automobile driven by Mary A. O'Keefe as she had reached a point, with her automobile, near the easterly end of said bridge.

7.

That the plaintiff is informed and believes and therefore alleges that the careless and negligent acts and omissions of the defendant, Walter Schoepski, were:

(a) Said defendant operated and drove his automobile without keeping a proper or any lookout as he approached and came to the place of the collision aforesaid.

(b) Said defendant negligently, carelessly, and recklessly failed and omitted to observe where he was driving as he approached and collided with the automobile driven by Mary A. O'Keefe.

(c) He negligently and carelessly permitted his automobile to be violently propelled into and against the automobile which Mary A. O'Keefe was driving.

(d) That said defendant (failed to heed said warning sign as he reached the high point to the East of said bridge and failed to slow down or slacken his speed) and he then and there completely failed to have and keep his automobile under control.

(e) He negligently and carelessly drove and swerved his automobile from the northerly to the southerly side of the highway and suddenly and without warning drove into the path of Mary A. O'Keefe's automobile as she was then and there approaching from the West and when she was less than ten feet from him on her own and the southerly side of said highway on the bridge aforesaid.

(f) That said defendant negligently and carelessly operated his automobile at a speed of more than sixty miles per hour (after he observed said warning sign at the high point to the East of said bridge) which speed was greater than was reasonable and proper under the conditions described and he crashed his automobile into the automobile then being driven by Mary A. O'Keefe, when there was, then and there more than twelve feet of clear driving space on said bridge where he could have guided his automobile past the automobile then being driven by Mary A. O'Keefe with perfect safety.

8.

That, as the direct and proximate result of the aforesaid careless and negligent driving and acts

and omissions of the said defendant, Walter Schoepski, Mary A. O'Keefe was knocked violently about inside the automobile she was then and there driving and she sustained a crushed chest, fracture of the shoulder and right leg, a violent concussion of the brain and a basal skull fracture and fracture of the cervical vertebrae of her spine, as a proximate result of which Mary A. O'Keefe died at the place of the casualty on the 30th day of August, 1955.

9.

That immediately before said collision, as plaintiff is informed and believes and therefore alleges, Mary A. O'Keefe was in good health and uninjured and she had a life expectancy of 31 years and upward, during which time her husband and children would have received pecuniary benefits from her during her continued life and she had been and would have continued to be during the remainder of her life a devoted wife and mother to her husband and children; she was a graduate pharmacist and a housewife, who had been and would have continued to assist her husband with the operation and management of his farm and with the care of their children, and as the proximate result of the aforesaid negligence and carelessness of the defendant, her husband and children have been deprived of said pecuniary benefits and have forever lost and been deprived of her care, comfort, advice and society to their great damage in the sum of one hundred five thousand dollars (\$105,000.00).

10.

That by reason of the death of Mary A. O'Keefe her heirs were required to incur expense for her funeral in the reasonable sum of \$1,879.08, and thus they have sustained special damage in said sum and amount.

11.

That Mary A. O'Keefe was born April 17th, 1919; she was married November 15th, 1945, to Raymond O'Keefe who survives her; they have two children surviving her, to wit: Michael John Thomas O'Keefe, who was born March 12th, 1947, and Mary Jane Catharine O'Keefe, who was born April 18th, 1950; that her husband, Raymond O'Keefe, was born March 5th, 1908. That, as such administrator, the plaintiff brings and prosecutes this action as the personal representative of Mary A. O'Keefe for the benefit of the surviving widower, Raymond O'Keefe, and children, the above-named son and daughter.

12.

That all of said damages sustained by the aforesaid heirs, who are all of the heirs of Mary A. O'Keefe, deceased, were proximately caused by the aforesaid careless, negligent and reckless conduct, acts and omissions of the defendant, Walter Schoepski.

Wherefore, plaintiff demands judgment against the defendant for the sum One Hundred Six Thousand Eight Hundred Seventy-nine and 08/100 Dol-

lars (\$106,879.08), and for his costs in this action expended.

HARRISON AND GRANAT,
DOEPKER & HENNESSEY,

By M. J. DOEPKER,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed December 12, 1955.

[Title of District Court and Cause.]

ANSWER

For his answer to plaintiff's complaint, the defendant, Walter Schoepski, whose name is properly spelled Walter Schoepske, shows and alleges:

First Defense

That the complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

Defendant admits and denies the allegations of said complaint as follows:

1. Admits the allegations of paragraphs 1 and 2 of said complaint.
2. Admits the allegations of paragraph 3 of said complaint save and except that defendant denies any knowledge or information sufficient to form a belief as to the exact width of said highway from

shoulder to shoulder and denies that approaching traffic from the east of said bridge could not be seen by drivers from the west, at least while traffic from the east was within five hundred feet of said bridge; denies that the bridge described in plaintiff's complaint was a "narrow" bridge, if by said allegation the plaintiff intends to allege that there was less room for the passage of vehicles over said bridge than there was on the remainder of the highway either east or west from said bridge and denies that the center line of said highway was plainly marked with a white painted line, alleging the fact to be as it is that said white line was an intermittent or broken line.

3. Admits that on the 30th day of August, 1955, Mary A. O'Keefe was driving an automobile along the highway described in plaintiff's complaint at about the hour of 9:30 a.m. of said day and denies the remaining allegations in paragraph 4 of said complaint.

4. Admits the allegations of paragraph 5 of said complaint save and except that the defendant specifically denies that defendant was then and there coming over the high point to the east of said bridge at the time that Mary A. O'Keefe in her said automobile entered said bridge.

5. Denies the allegations of paragraph 6 of said complaint.

6. Denies the allegations of paragraph 7 of said complaint.

7. Denies the allegations of paragraph 8 of said complaint except what this defendant admits that Mary A. O'Keefe did sustain some serious and fatal injury at the time and place set forth in said complaint and admits that said Mary A. O'Keefe died at the place of the casualty on the 30th day of August, 1955.

8. Specifically denies that as the proximate result of any negligence and carelessness of the defendant, the husband and children of said Mary A. O'Keefe have been deprived of pecuniary benefits or that as a proximate result of any negligence or any carelessness of the defendant, they have been deprived of her care, comfort, advice and society in any sum and denies any knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 9 of said complaint.

9. Denies any knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 10 and 11 of said complaint.

10. Denies the allegations of paragraph 12 of said complaint.

Third Defense

That at the time and place set forth in plaintiff's complaint Mary A. O'Keefe so negligently and carelessly drove and operated the Buick automobile which she was then and there driving in an easterly direction as to cause the same to violently collide with the automobile which defendant was then driv-

ing in a general westerly direction and on defendant's own right-hand side of said highway; and, that any damages sustained by the plaintiff as the personal representative of said Mary A. O'Keefe, for the benefit of the surviving widower and children, or otherwise, at the time and place and on the occasion set forth in plaintiff's complaint were caused, or were contributed to, by the negligence, fault, and want of care on the part of Raymond O'Keefe, the owner of said Buick automobile, and on the part of said Mary A. O'Keefe, herself, and not by any negligence or fault or want of care on the part of this defendant.

Counterclaim

For his counterclaim, the defendant, Walter Schoepske, alleges:

I.

Adopts by reference the allegations of paragraph 2 of plaintiff's complaint.

II.

That on August 30, 1955, at about 9:30 o'clock in the morning, the defendant was driving his automobile, a 1952 Pontiac, in a westerly direction on U. S. Highway No. 2 in Phillips County, Montana, and his automobile had reached a bridge located about twelve (12) miles east of Malta, Montana, over which bridge the highway passes; that at the same time, one Mary O'Keefe was driving a 1955 Buick, owned by her husband, Raymond O'Keefe, who was riding in the automobile, in an easterly

direction on said U. S. Highway No. 2, and that the automobiles collided on said bridge.

III.

That the collision was caused by the negligence of Mary O'Keefe, who was driving the automobile for her husband, who was riding therein, and that she

1. Failed to keep a proper lookout prior to and at the place where the collision occurred;

2. Drove the Buick automobile on the wrong side of the highway;

3. Drove the Buick automobile into the Pontiac automobile, which was on its proper side of the road;

4. Drove the automobile after drinking intoxicating beverages;

5. Drove the Buick automobile at an excessive rate of speed under the circumstances.

IV.

That as a result of the negligence of Mary O'Keefe, in causing the collision as stated above, Walter Schoepske was rendered unconscious and suffered many injuries, consisting, among other things, of (a) compound fractures of the left leg, (b) head injuries, and (c) broken ribs.

V.

That in the reasonable treatment of his injuries, Walter Schoepske was required to employ skilled

physicians and surgeons, and he incurred obligations for such services in the amount of \$400.00 to the date of the filing of this counterclaim, and he will be required to expend large sums of money in the future for the services of physicians and surgeons in the reasonable treatment of his injuries.

VI.

That further, in the reasonable treatment of his injuries, Walter Schoepske was hospitalized and incurred obligations for such hospital services in the amount of \$867.99 to the date of the filing of this counterclaim, and he will be required to expend large sums of money in the future, in the reasonable treatment of his injuries.

VII.

That at the time Walter Schoepske was injured, as aforesaid, he was in reasonably good health, able-bodied, steadily and gainfully employed, and earning \$110.00 per week, and that defendant was unable to work and has lost \$3,190.00 in wages to the date of the filing of this counterclaim.

VIII.

That as a result of his injuries, Walter Schoepske will be permanently crippled and disabled in a degree which cannot be accurately estimated at this time, and, therefore, he respectfully requests permission to amend this counterclaim, by inserting herein his loss of future earnings prior to the trial

of this cause and at a time when he can more accurately estimate them.

IX.

That Walter Schoepske has suffered, is suffering and will continue to suffer great physical pain, mental agony, anguish and humiliation by virtue of his injuries, as aforesaid, and he will permanently suffer therefrom to his general damage in the amount of \$35,000.00.

Wherefore, defendant demands:

1. That plaintiff's complaint be dismissed and plaintiff take nothing by this action.

2. That defendant have judgment against plaintiff on his counterclaim for the sum of \$39,447.99, as and for his general and special damages, and for defendant's costs and disbursements incurred in and by reason of this action.

HALL, ALEXANDER &
BURTON,
ANGLAND & MARRA,

By /s/ EDW. ALEXANDER,
Of Counsel,
Attorneys for Defendant.

Affidavit of mail attached.

[Endorsed]: Filed May 3, 1956.

[Title of District Court and Cause.]

REPLY

For his Reply to defendant's Counterclaim, which is designated as such in his Answer, the plaintiff admits, denies and alleges:

First Defense

I.

Admits the allegations of paragraph I which was adopted from plaintiff's complaint.

II.

Admits the allegations of paragraph II of defendant's Counterclaim except that plaintiff denies that the 1955 Buick mentioned in said paragraph was owned by her husband, Raymond O'Keefe, and in this connection alleges that said automobile was owned by Mary A. O'Keefe.

III.

Denies the allegations of paragraph III of defendant's Counterclaim, save and except that plaintiff admits that the husband of Mary A. O'Keefe was riding in her automobile at the time and place of the collision.

IV.

Denies specifically that as a result of any negligence whatsoever of Mary O'Keefe the collision mentioned in paragraph IV was caused; admits that Walter Schoepske was injured in said collision but alleges that he does not have any knowledge, suf-

ficient to form a belief as to the nature and extent of his injuries but specifically denies that any injuries received by said Walter Schoepske were in any manner or degree caused or contributed to by any negligent or careless act or omission of the said Mary A. O'Keefe.

V.

Denies any knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph V of defendant's Counterclaim, but specifically denies that the said Walter Schoepske was required to employ or will be required to employ physicians and surgeons or incur any expense whatsoever by reason of any negligence whatsoever of the said Mary A. O'Keefe.

VI.

Denies any knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph VI of defendant's counterclaim, but specifically denies that the said Walter Schoepske was hospitalized or incurred obligations for such services by reason of any negligence whatsoever of the said Mary A. O'Keefe.

VII.

Denies any knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph VII of defendant's counterclaim, but specifically denies said Walter Schoepske was injured, damaged or lost any wages whatsoever or any earnings whatsoever by reason of any negligent act or omission whatsoever of Mary A. O'Keefe.

VIII.

Denies any knowledge or information sufficient to form a belief as to the allegations of paragraph VIII of Defendant's Counterclaim but specifically denies that the said Walter Schoepske was, in any manner crippled, disabled or that he will lose any earnings whatsoever by reason of any negligent act or omission whatsoever of Mary A. O'Keefe.

IX.

Denies any knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph IX of Defendant's Counterclaim and specifically denies that Walter Schoepske has suffered damage in any sum or amount whatsoever as a proximate result of any negligent act or omission or any negligence whatsoever of Mary A. O'Keefe.

Second Defense

Plaintiff denies generally each and every allegation, matter or thing in the nature of new and/or affirmative matter, contained in the defendant, Walter Schoepske's Counterclaim, which has not been, in the foregoing First Defense specifically admitted or denied.

Third Defense

That at the time and place described in defendant's counterclaim the defendant, Walter Schoepske, so negligently and carelessly drove and operated the 1952 Pontiac automobile which he owned along U. S. Highway No. 2 in a westerly direction with-

out keeping any lookout, without any control, and negligently and carelessly swerved his automobile from the northerly to the southerly side of the highway into collision with the automobile owned and being then and there driven by Mary A. O'Keefe who, at all times was driving her automobile on her own right-hand side of the highway and any damages sustained by the defendant at the time and place described in defendant's counterclaim were caused or were contributed to as the proximate result of the negligence, wrongful conduct, fault and carelessness of Walter Schoepske himself and not by any negligence of Mary A. O'Keefe or any of the occupants of her automobile at said time and place.

Fourth Defense

That defendant's counterclaim fails to state a claim against plaintiff, as Administrator of the Estate of Mary A. O'Keefe, deceased, or otherwise, upon which relief can be granted.

Wherefore, plaintiff demands judgment that defendant's Counterclaim herein be dismissed at his costs and that he take nothing thereby. That he have the relief demanded in his Complaint.

HARRISON & GRANAT,
DOEPKER & HENNESSEY,

By /s/ M. J. DOEPKER,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 24, 1956.

In the District Court of the United States for the
District of Montana, Havre Division

Civil No. 1798

STEPHEN GRANAT, as Administrator of the
Estate of Mary A. O'Keefe, Deceased,

Plaintiff,

vs.

WALTER SCHOEPSKI,

Defendant.

Civil No. 1799

STEPHEN GRANAT, as Administrator of the
Estate of Mary A. O'Keefe, Deceased,

Plaintiff,

vs.

WALTER SCHOEPSKI,

Defendant.

Civil No. 1800

RAYMOND O'KEEFE,

Plaintiff,

vs.

WALTER SCHOEPSKI,

Defendant.

PLAINTIFF'S PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW

Now come the plaintiffs above named, after the
causes named were consolidated for trial and re-

spectfully request the Court to make the following Findings of Fact and Conclusions of Law after said causes were tried to the Court, sitting without a jury:

Findings of Fact

1. At all times herein mentioned the plaintiff, Stephen Granat, as Administrator of the Estate of Mary A. O'Keefe, deceased, was and he is and continues to be the administrator of said estate and was a citizen of the State of Montana, appointed by the District Court of the Seventeenth Judicial District of the State of Montana, in and for the County of Phillips; that plaintiff Raymond O'Keefe is and has been a citizen and resident of the Dominion of Canada; that defendant, Walter Schoepski, is and has been a citizen and resident of the State of Wisconsin.

That the amount involved in each of the above-named controversies, exclusive of interest and costs, exceeds three thousand dollars.

2. That, on the 30th day of August, 1955, there was, had been and continues to be a public highway known as U. S. Highway Number 2, which ran between the cities and towns of Havre, Malta, Glasgow, Montana, and Williston, North Dakota; at the point of the collision which occurred on that day on a bridge approximately twelve miles easterly from the City of Malta and for several miles easterly and westerly therefrom the highway was a hard surfaced highway, approximately 22 feet wide with black top surfacing and shoulders running along

said black top, which black top was 19 feet wide and the surface of said bridge measured 19 feet wide between bridge timbers forming the base of bridge railings constructed along the northerly and southerly sides of said bridge and extending for an over-all length of 96 feet in an easterly and westerly direction in said highway.

3. That the highway was straight on each side of said bridge easterly and westerly for more than five hundred feet and on the said day the highway was dry and the weather was clear with visibility unlimited at and before the time of the collision; approaching said bridge from the West on said highway the bridge was visible for several hundred feet; that immediately to the East of said bridge there was a rise in the highway, followed by a depression so that vehicles approaching from the East of said bridge were invisible to drivers approaching said bridge from the West, while such vehicles were in the low part of the depression to the East of said bridge; that at the high point to the east of said bridge there was on the northerly side of said highway a warning sign on the day of the collision containing the words "narrow bridges next ten miles"; there were no other signs erected by or under the authority of the Montana State Highway Department in the immediate vicinity of said bridge directing operators of vehicles to slow down or naming a minimum or maximum speed regulation in the vicinity of said bridge on the 30th day of August, 1955; the center line of said highway was marked

by center lines in the vicinity of said bridge with no center line marking on the surface of said bridge.

4. That on the 30th day of August, 1955, Mary A. O'Keefe, an experienced driver, was driving a Buick automobile, which she owned along highway No. 2 toward said bridge; she had left Havre, Montana, at approximately 6:40 a.m. Mountain Standard Time, and drove continually to the bridge approximately 12 miles east of Malta, Montana, arriving at the bridge at approximately 9:10 a.m.; Mary O'Keefe was driving her automobile carefully, guiding it along the right-hand side of the highway and keeping a careful lookout ahead of her; her husband, Raymond O'Keefe, and their two children were riding in the automobile with her; she had her automobile under control, prior to the collision, and she entered on said bridge on the southerly half thereof and continued thereon until the collision with a Pontiac automobile approximately two-thirds across said bridge from the West; that she was rendered unconscious in said collision and said Buick automobile continued easterly, without her control, and after rubbing along the southerly side of the bridge curved around to the northerly side off the highway and over a borrow pit or ditch at the easterly end of said bridge where it stopped.

5. That on the 30th day of August, 1955, Walter Schoepski was driving a Pontiac automobile, which he owned, along said highway No. 2 toward said bridge; he had left Williston, North Dakota, before daylight and drove continuously until he arrived

at said bridge approximately two hundred ten miles from Williston, North Dakota; he observed the highway sign and learned therefrom that there were narrow bridges ahead of him; coming over the high point approximately 450 feet from the bridge he saw the bridge and a Buick automobile coming toward the bridge from the West as he came down the incline toward the bridge from the East and knew that the Buick automobile would reach the bridge before he would; there was nothing about the driving of the Buick automobile, as he came down the incline and onto the bridge which caused him any concern; he did not see the Buick automobile out of its lane of travel as it approached and the cars came into collision on the southerly half of the surface of the bridge approximately thirty-five feet from the easterly end of the bridge.

6. That, in the operation of his automobile at said time and place, the defendant, Walter Schoepski, was guilty of the following acts and omissions of negligence:

a. He operated and drove his automobile without keeping a proper lookout as he approached and came to the place of the collision.

b. He negligently, carelessly and recklessly failed and omitted to observe where he was driving as he approached and collided with the Buick automobile.

c. He negligently and carelessly permitted his automobile to be violently propelled into and against

the Buick automobile and completely failed to have and keep the Pontiac automobile under control.

d. Observing that said bridge was narrow and that the Buick automobile would enter onto said bridge before he would, he negligently failed to use caution or circumspection in the operation of his Pontiac automobile at said time and place by yielding time to the operator of the Buick automobile to pass over said bridge, before entering thereon, or by exercising due care and caution in driving upon said bridge, after the Buick automobile had entered thereon, so as to see and know that he was safely on his own lane of traffic so as to avoid the danger of driving into collision with said Buick automobile.

e. Suddenly and without warning the defendant negligently and carelessly drove and swerved the Pontiac automobile from the northerly to the southerly side of the highway directly into the path of the Buick automobile as it was approaching on its own or southerly half of the surface of said bridge and crashed the left front end of the Pontiac automobile into the left front end and side of the Buick automobile.

7. That the Buick automobile involved in the collision, prior to the impact, measured 206.7 inches in length over all and was $76\frac{1}{4}$ inches in width; the Pontiac automobile was $202\frac{1}{2}$ inches in length over all and was $75\frac{11}{16}$ inches in width.

12. That immediately before said collision, Mary A. O'Keefe was in good health and uninjured, and would have, with reasonable probability, but for her injuries there sustained, continued to live out her life expectancy, during which time her husband and children would have received pecuniary benefits from her all during her continued life and she had been and would have continued to be, during the remainder of her life, a devoted wife to her husband and a devoted mother to her children; she was a graduate pharmacist and an experienced farm wife and, but for her death, she would have continued to assist her husband with the operation and management of his farms and with the care of their children and as the proximate result of the afore-said negligence and carelessness of the defendant, her husband and children have been and will be deprived of all of said pecuniary benefits and they have forever lost and been deprived of her care, comfort, advice and society to their great damage in the sum of one hundred and five thousand (\$105,000.00) Dollars.

13. That by reason of the death of Mary A. O'Keefe, Raymond O'Keefe has been required to expend for her funeral the reasonable sum of \$1,229.29 and thereby have sustained further damage in said sum and amount.

14. That by reason of the personal injuries sustained by Raymond O'Keefe he was required to expend the reasonable sum of \$362.50 for medical

treatment X-rays and hospitalization and he personally has been damaged in said additional sum.

15. That on the 30th day of August, 1955, after said collision, Mary A. O'Keefe survived her injuries and lived for at least twenty minutes before her death on said day and she suffered excruciating pain from her injuries for a few minutes and Mary O'Keefe was earning and was capable of earning the sum of five thousand dollars per year as a housewife and assisting in the operation of farms with her husband and as a graduate pharmacist, from which earnings she had and would have continued to have, for her own use and benefit, aside from her pecuniary expenses and contributions to her husband and children at least the sum of twelve hundred fifty dollars per year but as the proximate result of the aforesaid negligence of the defendant, said Mary O'Keefe was deprived of a long, useful and happy life and the fruits of her labor to her great damage in the sum of thirty-one thousand two hundred sixty dollars. That Mary A. O'Keefe could not, in her lifetime, bring an action for damages for her injuries and her administrator, Stephen Granat, as her personal representative, prosecuted the action on her behalf.

16. That in the operation of her Buick automobile, while approaching the bridge on the highway and while entering upon said bridge, she used ordinary care and prudence and drove on her own side of the highway at a reasonable speed and in a careful and prudent manner taking into account that the

highway was at least 19 feet wide, dry and straight on each side of said bridge and that the weather was clear and sunny and the surface of said bridge was of the same width as the black top, or 19 feet and there were no "slow" or other warning signs on her side of said bridge to the west for at least ten miles and that Mary A. O'Keefe had never passed over said highway before the 30th day of August, 1955; that her Buick automobile was new and in excellent condition and she was in good physical condition and capable of driving her automobile at said time and place, and was alert and watchful as she came onto said bridge, guiding her automobile on the right-hand or southerly side of said bridge until the instant of the collision.

17. The Court finds the facts generally in favor of the plaintiffs in the three consolidated causes, being Civil No. 1798, Civil Number 1799 and Civil No. 1800, and against the defendant in said causes.

18. The defendant, Walter Schoepske, sustained serious injuries in said collision, was hospitalized, incurred expense for the services of physicians and surgeons and lost wages because of his injuries but said injuries and damages were and are the proximate result of the said defendant's own negligence as are mentioned and described in Finding Number 6 and were not caused nor contributed to by Mary A. O'Keefe in any manner by careless or reckless conduct on her part or as the result of any negligence in her driving of the Buick automobile involved which she owned.

From the Foregoing Findings of Fact, the Court
Makes the Following Conclusions of Law:

I.

That this Court has jurisdiction of each and all of the consolidated cases and the parties to the actions.

II.

That, Stephen Granat, as Administrator of the estate of Mary A. O'Keefe, Deceased, in Cause No. 1798, is entitled to recover judgment against the defendant, Walter Schoepske, for the sum of one hundred and five thousand (\$105,000.00) Dollars and the further sum of one thousand two hundred twenty-nine and 29/100 (\$1,229.29) Dollars and for his costs of suit.

III.

That, Stephen Granat, as Administrator of the estate of Mary A. O'Keefe, deceased, in Cause No. 1799, is entitled to recover judgment against the defendant, Walter Schoepske, for the sum of thirty-one thousand two hundred and sixty (\$31,260.00) dollars and for his cost of suit.

IV.

That Raymond O'Keefe, in Cause No. 1800, is entitled to recover judgment against the defendant, Walter Schoepske, for the sum of thirty-two thousand five hundred (\$32,500.00) dollars and for his costs of suit.

V.

That defendant, Walter Schoepske's, respective Counterclaims should each and all be dismissed.

Let Judgment Be Entered in Accordance Here-
with.

Done this day of, 1957.

.....,

United States Judge.

The foregoing Proposed Findings of Fact and
Conclusions of Law are hereby submitted this 22nd
day of April, 1957.

STEPHEN GRANAT,
DOEPKER & HENNESSEY,

By /s/ M. J. DOEPKER,
Attorneys for Plaintiffs.

[Endorsed]: Filed April 22, 1957.

[Title of District Court and Cause.]

Nos. 1798, 1799, and 1800

DEFENDANT AND CROSS-COMPLAINANTS'
PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Comes now the defendant and cross-complainant
named in the three consolidated causes above and
respectfully requests this Court to make the follow-
ing Findings of Fact and Conclusions of Law:

The three causes above named were tried to this
Court without a jury and the Court having con-
sidered the briefs submitted by counsel and having

considered the pleadings, records, and the competent evidence herein and being fully advised, found issues of law and fact in favor of the defendant and cross-complainant, Walter Schoepske, and against the plaintiff, Stephen Granat, as administrator of the estate of Mary A. O'Keefe in Civil Actions Numbered 1798 and 1799, and against the plaintiff, Raymond O'Keefe, in Civil Action Numbered 1800.

The Court now makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

The Court finds that:

1. That this Court has jurisdiction in the above three causes on the ground of diversity of citizenship and on the ground that the amount involved in the controversy, exclusive of interest and costs, was and is in excess of Three Thousand and no/100ths Dollars (\$3,000.00).

2. That the plaintiffs in each of the three consolidated causes have failed to prove by a preponderance of the evidence that the injury or damages alleged in any of the complaints were proximately caused by any negligence on the part of the defendant, Walter Schoepske.

3. That on August 30, 1955, at about 9:30 a.m., the defendant and cross-complainant herein was driving his automobile in a westerly direction on U. S. Highway No. 2, in Phillips County, Montana,

and his automobile had reached a bridge located about twelve (12) miles east of Malta, Montana, over which bridge the highway passed. That at the same time, one Mary A. O'Keefe was driving her automobile in an easterly direction on said highway No. 2 and that the automobiles collided on said bridge. That there were warning signs bearing the legend "Narrow Bridges" both to the east and to the west of the bridge so that both the defendant-cross-complainant and Mary A. O'Keefe had the opportunity to observe them and be apprised.

That the bridge was of sufficient width for the automobiles to pass each other safely.

That the defendant-cross-complainant was operating his automobile on said bridge and in approaching said bridge in a careful and prudent manner;

That the defendant-cross-complainant was on his own side of the road.

That the defendant-cross-complainant was driving his automobile immediately prior to going upon said bridge at a rate of speed of about forty (40) miles per hour and that he reduced his speed upon entering said bridge to about thirty-five miles per hour.

That Mary O'Keefe was driving her automobile immediately prior to and upon said bridge at a rate of speed between sixty (60) and sixty-five (65) miles per hour, which speed was excessive under the conditions then and there existing.

That Mary O'Keefe failed to reduce her speed upon said bridge to an appropriate rate of speed under the conditions then and there existing.

That Mary O'Keefe drove her automobile on the wrong side of the highway and into the automobile owned and driven by the defendant-cross-complainant.

4. That Walter Schoepske, the defendant and cross-complainant herein, suffered severe injuries and was damaged by reason of the negligence of the said Mary A. O'Keefe.

5. That as a result of the negligent actions of the said Mary A. O'Keefe, the defendant and cross-complainant herein, has been damaged in the sum of

That from the foregoing facts the Court draws the following:

Conclusions of Law

1. The Court has jurisdiction of the parties and the subject matter herein.

2. That in causes of action 1798 and 1799 the plaintiff Stephen Granat as administrator of the estate of Mary A. O'Keefe, deceased, take nothing and that in cause No. 1800, the plaintiff, Raymond O'Keefe, take nothing.

3. That the injuries to Walter Schoepske, the defendant and cross-complainant herein, were sus-

tained by him as a direct and proximate result of the negligence of Mary A. O'Keefe.

4. That Walter Schoepske, the defendant and cross-complainant herein, has been damaged by the said Mary A. O'Keefe's negligence in the sum of \$35,000, and that he is entitled to judgment, therefore, against Stephen Granat, as administrator of the estate of Mary A. O'Keefe, deceased, the plaintiff, in the amount of, together with the costs necessarily incurred herein.

Let Judgment Be Entered in Accordance Herein.

Done this day of, 1957.

.,
United States Judge.

The foregoing proposed Findings of Fact and Conclusions of Law are submitted this day of June, 1957.

H. CLEVELAND HALL,
EDWARD C. ALEXANDER,
JOHN H. KUENNING,
EMMETT C. ANGLAND,
JOSEPH R. MARRA,

By /s/ EDW. C. ALEXANDER,

/s/ JOSEPH R. MARRA,

Attorneys for Defendant and
Cross-Complainant.

[Title of District Court and Cause.]

Nos. 1798, 1799 and 1800

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above causes were consolidated and came on regularly for trial before the Court, sitting without a jury, on the 25th day of October, 1956; the plaintiffs were present in court and represented by their counsel James T. Harrison, Esq., of Malta, Montana, and M. J. Doepker, Esq., of Butte, Montana; and the defendant was present in person and represented by his counsel Edward C. Alexander, Esq., Emmett C. Angland, Esq., and Joseph R. Marra, Esq., all of Great Falls, Montana; thereupon oral and documentary evidence was introduced by and on behalf of each of the parties, and thereafter and on the 29th day of October, 1956, further trial of the cause was continued, and on January 14, 1957, additional evidence was introduced on behalf of the parties, and at the close of all of the evidence the parties rested and thereafter, within the time granted by the Court, each of the parties filed their briefs and proposed Findings of Fact and Conclusions of Law, and the cause was then submitted to the Court for its consideration and decision, and the Court having considered all of the evidence and testimony submitted at the trial of the cause, and the briefs of counsel, and being fully advised in the premises, now makes and orders filed

its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

I.

That the plaintiff Stephen Granat is a citizen and resident of the State of Montana; that said plaintiff's intestate, Mary A. O'Keefe, was, at the time of the accident herein involved, a citizen and resident of the Province of Ontario, Canada; that the plaintiff Raymond A. O'Keefe is a citizen and resident of the Province of Ontario, Canada; that the defendant Walter Schoepski is a citizen and resident of the State of Wisconsin; that the matter in controversy in this cause, exclusive of interest and costs, exceeds the sum of \$3,000.00.

II.

That the plaintiffs in each of the three consolidated causes have failed to prove by a preponderance of the evidence that the injury or damages alleged in each and all of their complaints were proximately caused by any negligence on the part of the defendant Walter Schoepski.

III.

That on August 30, 1955, at about 9:30 a.m., the defendant and cross-complainant herein was driving his automobile in a westerly direction on U. S. Highway No. 2, in Phillips County, Montana, and his automobile had reached a bridge located about twelve miles east of Malta, Montana, over which

bridge the highway passed. That at the same time, one Mary A. O'Keefe was driving her automobile in an easterly direction on said Highway No. 2 and that the automobiles collided on said bridge. That there were warning signs bearing the legend "Narrow Bridge" both to the east and to the west of the bridge so that both the defendant and cross-complainant and Mary A. O'Keefe had the opportunity to observe them and be apprised; that the bridge was of sufficient width for the automobiles to pass each other safely; that the defendant and cross-complainant was operating his automobile on said bridge at the time of the collision aforesaid in a careful and prudent manner and on his own side of the road; that the said Mary A. O'Keefe, in operating her automobile upon said bridge, negligently crossed over the center line and her said automobile collided with the automobile owned and driven by the defendant and cross-complainant; that the proximate cause of said collision was the negligence of said Mary A. O'Keefe in crossing over the center line of said highway and into the lane of travel of said defendant and cross-complainant.

IV.

That at the time of trial, said Walter Schoepski was a man of the age of 60 years, and that he had a normal life expectancy of 14.5 years.

V.

That as a result of said collision, said defendant and cross-complainant received the following injuries; severe surgical shock, laceration of the

forehead which required suturing, numerous bruises, cuts and lacerations, some of which would ordinarily have required suturing, but which was not done because of the patient's condition at the time would not permit it; severe displaced comminuted fracture of the left femur; fractures of the fifth, sixth, seventh, eighth and tenth ribs on the left side of the chest, with damage to the left lung. That upon his admission to the hospital at Malta, Montana, on August 30, 1955, as a result of said injuries, the condition of said defendant and cross-complainant was very critical for at least four hours; that the fracture of the left femur required open reduction by surgery and the application of a metal plate with screws to hold the bone fragments in place, but because of the severity of the chest injury such operation could not be undertaken until September 15, 1955; that said defendant and cross-complainant remained in the hospital at Malta, Montana, for approximately seven weeks; that he left the hospital in Malta, Montana, after seven weeks with his leg in a cast and on a stretcher and was more or less confined to home until March, 1956; that he could walk only with the aid of crutches until February, 1956, and then required, and still requires the aid of a cane to walk. That as a result of said accident and injuries said defendant and cross-complainant suffers from a nervous condition. That as a permanent result of said injuries defendant and cross-complainant suffers a scar on his forehead and one on his left hand, a bowing of the femur bone of the left leg and shorten-

ing of the leg with a limitation of motion which causes him to walk with a limp and require the assistance of a cane, and a general weakness of said leg. As a result of said injuries said defendant and cross-complainant suffered severe pain and discomfort which required, during his entire stay in the hospital, sedatives and narcotics for the relief thereof, and that thereafter he suffered and will in the future continue to suffer pain and discomfort in a lesser degree. That all of said injuries were proximately caused by the negligence of said Mary A. O'Keefe, and resulted in damage to defendant and cross-complainant in the sum of thirty-five thousand (\$35,000) dollars.

VI.

As a result of said accident, said defendant and cross-complainant was required to pay and did pay the following hospital and medical expenses for treatment of his said injuries:

Malta Hospital, Malta, Montana	\$ 867.99
Doctor Wiprud, Malta, Montana	375.00
X-rays, Beloit, Wisconsin	22.50
Cast removal, Beloit, Wisconsin	3.00
Dr. Cochrane, Beloit, Wisconsin	6.00
<hr/>	
Total	\$1,274.49

That all of said charges were reasonable charges for the service rendered.

VII.

At the time of said accident defendant and cross-complainant was a skilled boring machine operator,

capable of earning and earning the sum of \$125.00 per week. By reason of the injuries received in said accident, he was unable to work from August 30, 1955, to March 19, 1956, a period of approximately 28 weeks, and thereby suffered loss of wages in the sum of \$3,500.00. Upon returning to work on March 19, 1956, defendant and cross-complainant, because of the effects of said injuries, and particularly the injury to his left leg, was unable to return to his job as a machine operator, but had to accept a less demanding job at the lower rate of pay of \$96.25 per week, and he will in the future be unable to return to his job as a machine operator because of the permanent injury to his left leg. That between March 19, 1956, and October 25, 1956, the date of trial, a period of approximately 31 weeks, by virtue of the lower rate of pay, defendant and cross-complainant suffered a loss of wages in the sum of \$891.25. That defendant and cross-complainant had worked for the same company for 14 years as a machine operator, and prior to his injuries was reasonably certain to have continued working for the company in the same capacity until he reached the retirement age of 65; that since his injuries defendant and cross-complainant is likewise reasonably certain to continue working for the same company until he reaches 65 years of age, but at the reduced pay of \$96.25 per week; that there was no evidence produced at the trial as to defendant and cross-complainant's birthdate, but as he was 60 years of age at the time of trial, there will be at least four years until he reaches his 65th birthday, and that

during said four years it is reasonably certain that he will suffer \$1,495.00 per year loss of earnings by virtue of his reduced earning capacity; that the present value of \$1,495.00 per year for a four-year period is \$5,556.92.

From the foregoing Findings of Fact the Court draws the following:

Conclusions of Law

I.

That the Court has jurisdiction of the parties and the subject matter herein.

II.

That in causes of action 1798 and 1799 the plaintiff Stephen Granat, as Administrator of the Estate of Mary A. O'Keefe, deceased, take nothing and that in Cause No. 1800 the plaintiff Raymond O'Keefe take nothing.

III.

That the injuries to Walter Schoepski, the defendant and cross-complainant herein, were sustained by him as a direct and proximate result of the negligence of Mary A. O'Keefe.

IV.

That Walter Schoepski, the defendant and cross-complainant herein, has been damaged by the said Mary A. O'Keefe's negligence in the sum of Thirty-five Thousand and no/100ths (\$35,000) Dollars general damages and Eleven Thousand Two Hundred

Twenty-two and 66/100ths (\$11,222.66) Dollars special damages, and that he is entitled to judgment, therefore, against Stephen Granat, as Administrator of the Estate of Mary A. O'Keefe, deceased, the plaintiff, in the sum of Forty-six Thousand Two Hundred Twenty-two and 66/100ths (\$46,222.66) Dollars, together with costs necessarily incurred herein.

V.

Proof of the special damages found in the Findings of Fact having been received without objection, the counterclaims of Walter Schoepski, in Causes 1798 and 1799, are deemed amended to conform to the proof pursuant to Rule 15(b), Federal Rules of Civil Procedure, and the relief to which defendant and cross-complainant is entitled under such proof has been granted pursuant to Rule 54(c), Federal Rules of Civil Procedure.

Counsel for the said defendant and cross-complainant are ordered to prepare, submit to counsel for plaintiff for approval as to form, and present to the Court for signature, a form of judgment in conformity with the foregoing Findings of Fact and Conclusions of Law within 10 days from date of receipt of a copy of said Findings of Fact and Conclusions of Law.

Dated this 9th day of August, 1957.

/s/ W. D. MURRAY.

[Endorsed]: Filed August 9, 1957.

In the United States District Court for the District
of Montana, Havre Division

Nos. 1798, 1799 and 1800

STEPHEN GRANAT, as Administrator of the
Estate of Mary A. O'Keefe, Deceased,

Plaintiff,

vs.

WALTER SCHOEPSKI,

Defendant.

STEPHEN GRANAT, as Administrator of the
Estate of Mary A. O'Keefe, Deceased,

Plaintiff,

vs.

WALTER SCHOEPSKI,

Defendant.

RAYMOND O'KEEFE,

Plaintiff,

vs.

WALTER SCHOEPSKI,

Defendant.

JUDGMENT

The above causes were consolidated and came on regularly for trial before the Court, sitting without a jury, on the 25th day of October, 1956; the plaintiffs were present in Court and represented by their counsel, James T. Harrison, Esq., of Malta, Montana, and M. J. Doepker, Esq., of Butte, Montana;

and the defendant was present in person and represented by his counsel, Edward C. Alexander, Esq., Emmett C. Angland, Esq., and Joseph R. Marra, Esq., all of Great Falls, Montana; thereupon oral and documentary evidence was introduced by and on behalf of each of the parties, and thereafter and on the 29th day of October, 1956, further trial of the cause was continued, and on January 14, 1957, additional evidence was introduced on behalf of the parties, and at the close of all of the evidence the parties rested and thereafter, within the time granted by the Court, each of the parties filed their briefs and proposed Findings of Fact and Conclusions of Law, and the cause was then submitted to the Court for its consideration and decision; thereafter on the 9th day of August, 1957, the Court filed herein its Findings of Fact and Conclusions of Law to which documents now on file, reference is hereby made as if the same were set out herein in exact words and figures. The Court in said documents found that the defendant and cross-complainant, Walter Schoepski, has been damaged by the negligence of Mary A. O'Keefe in the sum of \$46,222.66 and that judgment should be entered for such sum and costs in favor of the defendant and cross-complainant against the plaintiff, Stephen Granat as Administrator of the Estate of Mary A. O'Keefe, deceased, and the Court in said documents found that the plaintiff, Raymond O'Keefe take nothing against the defendant in Cause No. 1800 above referred to.

Wherefore, It Is Hereby Ordered, Adjudged and Decreed that the defendant and cross-complainant have and recover of and from the plaintiff, Stephen Granat as Administrator of the Estate of Mary A. O'Keefe, in Causes No. 1798 and 1799, the sum of \$46,222.66; together with defendant and cross-complainant's costs herein taxed at the sum of \$452.36 and that such judgment bear interest at the rate of six per cent per annum from date hereof until paid, and

It Is Further Ordered, Adjudged and Decreed that judgment be entered in favor of the defendant and cross-complainant and against the plaintiff in Cause No. 1800, and that plaintiff take nothing by his Complaints in Causes Nos. 1798 and 1799.

Dated this 19th day of August, 1957.

/s/ W. D. MURRAY,
Judge.

The foregoing draft of Judgment is hereby approved, as to form.

/s/ STEPHEN GRANAT,
DOEPKER & HENNESSEY,

By /s/ M. J. DOEPKER,
Attorneys for Plaintiffs.

[Endorsed]: Filed and entered August 19, 1957.

[Title of District Court and Cause.]

Nos. 1798, 1799 and 1800

**MOTION FOR AMENDMENT OF FINDINGS
AND FOR MAKING ADDITIONAL FIND-
INGS OF FACT AND CONCLUSIONS OF
LAW**

The plaintiffs in the above causes, in accordance with the provisions of Rule 52-B of the Federal Rules of Civil Procedure, moves that the findings of fact heretofore entered herein, be amended and additional findings made in the following particulars:

Strike from finding of fact III, the following:

“* * * that the defendant and cross-complainant was operating his automobile on said bridge at the time of the collision aforesaid in a careful and prudent manner and on his own side of the road; that the said Mary A. O’Keefe, in operating her automobile upon said bridge, negligently crossed over the center line and her said automobile collided with the automobile owned and driven by the defendant and cross-complainant; that the proximate cause of said collision was the negligence of said Mary A. O’Keefe in crossing over the center line of said highway and into the lane of travel of said defendant and cross-complainant.”

To strike from said findings of fact, paragraphs IV, V, VI and VII.

That in place of the stricken matter, the Court find as follows:

That the bridge in question was 19 feet in width on the travelled portion thereof; that the Buick automobile was a red painted automobile and the width of the Buick automobile was $76\frac{1}{4}$ inches; that the length of the Buick automobile was 206.7 inches, overall; that the width of the Pontiac automobile was $75\text{--}11\frac{11}{16}$ inches and the length of said Pontiac automobile was $202\frac{1}{2}$ inches, overall.

That red paint from the Buick automobile was lightly deposited on the south railings of the bridge, beginning at a point 24'8" from the west end of the bridge, a piece 2'10" long; a second scraping of red paint from the Buick was 14'1" from the first scrape and a third large scraping was 19'6", indicating that the Buick automobile was travelling throughout the bridge on its own south side of the bridge.

That in said collision, which occurred approximately 42 feet from the easterly end of said bridge, the automobiles collided and came together at approximately the left front ends of each automobile.

That in said collision, a portion of the Buick automobile was crushed downward so that it made a gouge mark on the surface of the bridge at a point directly opposite the front end of the Pontiac Automobile, as it came to rest after the collision, so that the left front of the Pontiac automobile, after the collision, was 6 feet from the bridge railing and the right front was 6'10" from the bridge

railing; that said collision took place not to exceed 2 feet from said gouge mark on the south half of the bridge; that all physical evidence indicated that the post collision debris from the Buick was south of the center line and west of the point of impact; the post collision debris from the Pontiac was underneath and to the east of the Pontiac in its position after the collision; that there was no evidence upon the surface of the bridge westerly from the point of the collision in the matter of post collision debris, or other credible physical or other evidence of the collision occurring on the north half of the bridge.

That in said collision, the Pontiac automobile was pushed backward and upward; that prior to the moment of impact the Pontiac automobile crossed over the imaginary center line of the bridge and into the path of the Buick automobile; and that the collision occurred at a point on said bridge south of the imaginary center line thereof.

That the defendant Walter Schoepski, seated in his Pontiac automobile, observed the Buick automobile approaching and did not see the Buick automobile leave its lane of travel on the south side of the bridge.

Plaintiffs move to strike the said findings of fact and conclusions of law of the Court and substitute in place thereof, plaintiffs' proposed findings of fact and conclusions of law heretofore filed in this cause.

Dated this 28th day of August, 1957.

/s/ M. J. DOEPKER.

/s/ STEPHEN GRANAT.

Attorneys for Plaintiffs.

Service of Copy acknowledged.

[Endorsed]: Filed August 29, 1957.

[Title of District Court and Cause.]

Nos. 1798, 1799 and 1800

MOTION FOR A NEW TRIAL

Now comes the plaintiffs in the above-consolidated causes, and each thereof, and moves the Court to grant them a new trial of said actions and to set aside the Judgment rendered and entered in said cause, on the 19th day of August, 1957, on the following grounds and for the following reasons:

I.

That the Court's findings heretofore sought to be stricken in plaintiffs' motion to amend said findings, were each and all against the evidence.

II.

That said findings are each and all against the law.

III.

That the Court erred in finding that Mary O'Keefe crossed over the center line of said bridge with her automobile, because there is no evidence in the case to support such finding and all physical

facts are contrary to such finding, as appears from the evidence in this case.

IV.

That the Court erred in not finding that the defendant, Walter Schoepski, negligently crossed over the center line of said bridge directly into the path of the Buick automobile driven by Mary A. O'Keefe, because all physical evidence demonstrates that such occurred.

V.

The Court erred in refusing the plaintiffs to testify in said cause concerning the condition of the highway to the east end of the bridge.

VI.

That the plaintiffs have newly discovered evidence, material to this cause, which could not, with reasonable diligence, be discovered in time to produce such evidence at the trial of the cause.

VII.

The Court erred in entering Judgment for the defendant.

Dated this 28th day of August, 1957.

/s/ M. J. DOEPKER,

/s/ STEPHEN GRANAT,

By /s/ M. J. DOEPKER,

Attorneys for Plaintiffs.

Service of Copy acknowledged.

[Endorsed]: Filed August 29, 1957.

[Title of District Court and Cause.]

Nos. 1798, 1799 and 1800

ORDER

Plaintiffs in the above-entitled causes, which were consolidated for trial, have filed motions for amendment of findings, and for making additional findings of fact and conclusions of law and motions for a new trial, the said motions for a new trial being supported by affidavits filed with said motions, and all of the motions having come on for hearing before the Court on the 18th day of March, 1958, they were submitted to the Court for its consideration and decision, and the Court having considered all of said motions, the affidavits and the arguments, and being fully advised in the premises,

The Court has studied the brief of plaintiffs and read again the pertinent parts of the transcript and is still not able to see or understand any reason why it should change the findings of fact heretofore made in the cases.

Counsel for plaintiffs whole argument is based upon an assumption that the car driven by Mary O'Keefe was at all times on its own side of the road of the bridge and then builds up his argument on the further assumption that the physical facts at the time of impact of the automobiles and immediately thereafter were as he argues them to be.

This argument of plaintiffs is fallacious in at least two respects. Counsel's argument assumes that

the position of the Pontiac automobile driven by Mr. Schoepski came to rest in exactly the same position as demonstrated by measurements of Mr. Hardesty and photographs taken some time after the accident. It is pointed out that this testimony is not entirely reliable because of the time lapse and because of other evidence with reference to the moving of the automobile and parts thereof.

Counsel's further argument, that assuming that the O'Keefe car was at all times on its proper side of the road of the bridge, that the physical facts are compatible with such assumption and therefore the position of the O'Keefe car is proved, is likewise fallacious. The Court has not given credence to the testimony of Raymond O'Keefe, and plaintiffs' own proof demonstrates that the physical facts assumed by plaintiff are likewise compatible with a finding that the O'Keefe car struck the Schoepski car on the north side of the imaginary center line of the road of the bridge which was the proper and fixed right-of-way for the Schoepski car.

The Court has accepted the testimony of the witnesses West and Keough with reference to the position of the Schoepski car prior to and at the time of impact and the physical facts do not weaken or destroy the testimony of those witnesses. The Court has found that the Schoepski car was at all times prior to impact on its proper side of the road. The O'Keefe car then necessarily was on the wrong side of the road at impact. All other facts proved in the case are compatible with such findings. The

affidavit submitted plaintiffs in support of their motions for new trial do not move the Court.

The first affidavit, that of V. P. Mauritsen, is no attack upon the truth and veracity of the witness West.

The affidavit of Katherine L. Johnson is that of a person who has been admittedly engaged in bitter litigation against witness West.

The affidavit of Charles H. McChesney is with reference to the relative positions of the automobiles of the witness West and the witness Mrs. Keough as they were parked near the scene of the accident. More specifically the affidavit is to the effect that the Keough car was parked at the place where West said his car was parked. There is some controversy and confusion in all of the testimony with reference to the exact location of the cars as they were parked following the accident, but this does not in any way destroy or weaken the testimony of Mrs. Keough or Pat West and therefore could not change the results of the cases.

The final affidavit is that of M. J. Doepker, counsel for plaintiffs, merely to the effect that he procured the affidavits with reference to the witness West when he learned sometime in the month of June, 1957, that the witness West was not a person of truth and integrity. As heretofore pointed out, the affidavits with reference to West are in the case of Mauritsen insufficient and in the case of Mrs. Johnson obviously that of a biased and prejudiced person.

None of the grounds stated in the affidavits or arguments and brief of the plaintiffs are sufficient to warrant the Court to order a new trial.

It Is Therefore Ordered and Adjudged that the motions of plaintiffs for amendment of findings and for making additional findings of fact and conclusions of law and the motions for a new trial are and each of them is denied.

Done and dated this 19th day of March, 1958.

/s/ W. D. MURRAY,

United States District Judge.

[Endorsed]: Filed March 19, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Comes now the plaintiff, Stephen Granat, as Administrator of the Estate of Mary A. O'Keefe, deceased, and hereby gives notice, that said Stephen Granat, as Administrator of the Estate of Mary A. O'Keefe, deceased, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from that certain judgment entered in favor of the Defendant and against the Plaintiff on August 19, 1957, after Motion for New Trial and Amendment of Findings denied by the final judgment of said District Court signed and filed March 19, 1958, and entered in this action on March 19, 1958.

Dated this 18th day of April, 1958.

STEPHEN GRANAT,

Attorney-at-Law;

DOEPKER & HENNESSEY,

By /s/ MAURICE F. HENNESSEY,

Attorneys for Plaintiff.

[Endorsed]: Filed April 18, 1958.

[Title of District Court and Cause.]

No. 1798

BOND ON APPEAL TO UNITED STATES
COURT OF APPEALS FOR NINTH CIR-
CUIT

Know All Men by These Presents:

That the undersigned Surety is held and firmly bound unto Walter Schoepski, the Defendant above named, in the full and just sum of Two Hundred Fifty (\$250.00) Dollars, to be paid to the said Walter Schoepski, to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents. Sealed with the Corporate Seal of said Surety Company this 18th day of April, 1958.

Whereas lately in the United States District Court for the District of Montana, Havre Division, in a suit pending in said Court between Stephen Granat, as Administrator of the Estate of Mary A. O'Keefe, deceased, Plaintiff, and Walter Schoepski,

Defendant, judgment was rendered in favor of the Defendant and against the Plaintiff and the said Plaintiff, Stephen Granat, as Administrator of the Estate of Mary A. O'Keefe, deceased, has taken an appeal to the United States Court of Appeals for the Ninth Circuit, to reverse the said judgment.

Now, the condition of the above obligation is such that if the said Stephen Granat, as Administrator of the Estate of Mary A. O'Keefe, deceased, Plaintiff above named, shall prosecute said appeal to effect and answer all damages and costs if he fail to make good the said appeal, then the above obligation to be void, else to remain in full force and virtue.

Signed with the seal of said Surety impressed, with the signature of its proper officer and attorney in this behalf authorized, this 18th day of April, 1958.

[Seal] UNITED STATES FIDELITY AND
GUARANTY COMPANY,

A Bonding Corporation, as
Surety.

By /s/ DON L. ENGLEKING,
Attorney-in-Fact, Its Duly
Authorized Officer.

Countersigned:

EXCELSIOR INSURANCE
AGENCY,

By /s/ DON L. ENGLEKING,
Montana Licensed Agent.

[Endorsed]: Filed April 18, 1958.

[Title of District Court and Cause.]

Nos. 1798, 1799 and 1800.

ORDER

Plaintiffs and appellants in each of the above-entitled causes having petitioned the Court for additional time to prepare, file and serve the designation of portions of record on appeal, and it appearing to be a proper case therefore

It is ordered that each of the above-named plaintiffs and appellants and they are hereby granted additional time to and including July 10th, 1958, in which to prepare, file and serve the designations of portions of record on appeal to be designated by each of them.

Dated this 26th day of May, 1958.

/s/ W. D. MURRAY,
Judge.

[Endorsed]: Filed May 26, 1958.

[Title of District Court and Cause.]

Nos. 1798, 1799 and 1800

MINUTE ENTRIES

THURSDAY, OCTOBER 25, 1956

Present: Honorable W. D. Murray, Judge.

The above-entitled causes came on regularly for trial this day, Mr. Mark J. Doepker and Mr. James

T. Harrison being present and appearing for the plaintiffs, and Mr. Edward C. Alexander, Mr. Emmett C. Angland and Mr. Joseph R. Marra being present and appearing for the defendant.

Thereupon counsel for respective parties stipulated that the three causes may be consolidated for trial at this time, and said causes thereupon were ordered consolidated for trial.

Thereupon it was stipulated by the Court and counsel for respective parties that the trial of the causes will proceed with the taking of testimony and evidence, and that the Court will thereafter set a session so that the witness not now available for the defendant may appear and testify at a later date, and that after such witness testifies counsel for plaintiff can present rebuttal testimony orally or by deposition.

Thereupon Raymond O'Keefe was sworn and examined as a witness for plaintiffs, and a photograph, marked Plaintiffs' Exhibit No. 1, was offered and received in evidence without objection, and a Citation, marked Plaintiffs' Exhibit No. 2, and a photograph, marked Plaintiffs' Exhibit No. 3, were offered by plaintiff, to which offer the defendant objected and the objection of defendant thereupon sustained, and such offered exhibits were thereupon not received in evidence.

Thereupon Cleo E. Coles was sworn and examined as a witness for the plaintiffs, a group of 15 photo-

graphs were marked Plaintiffs' Exhibit No. 4, a document classed as a legend pertaining to the 15 photographs composing, Plaintiffs' Exhibit No. 4, was marked Plaintiffs' Exhibit No. 5, and two photographs were marked Plaintiffs' Exhibits Nos. 6 and 7, respectively, whereupon said Exhibits numbered Plaintiffs' 4, 5, 6 and 7, respectively were offered, and received in evidence without objection.

Thereupon three colored stereoscopic pictures were marked Plaintiffs' Exhibits Nos. 8, 9 and 10, respectively, were offered by the plaintiffs, to which offer the defendant objected and said objections thereupon sustained and said offered exhibits were thereupon not received in evidence.

Thereupon six photographs were marked Plaintiffs' Exhibits Nos. 11, 12, 13, 14, 15 and 16, respectively, and ten colored stereoscopic pictures were marked Plaintiffs' Exhibits Nos. 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26, respectively, for identification.

Thereupon Vern Kapphan was sworn and examined as a witness for the plaintiffs, and Raymond O'Keefe was recalled and examined as a witness for plaintiffs, and a receipted statement, marked Plaintiffs' Exhibit No. 27, was offered, and received in evidence without objection, and an automobile purchase order, marked Plaintiffs' Exhibit No. 28, was offered in evidence by the plaintiff, to which offer the defendant objected, and ruling on said objection was reserved by the Court, whereupon fur-

ther trial of the causes was ordered continued until 10:00 a.m. tomorrow.

Entered in open Court October 25, 1956.

E. WARREN TOOLE,
Clerk.

[Title of District Court and Cause.]

Nos. 1798, 1799 and 1800

MINUTE ENTRIES
FRIDAY, OCTOBER 26, 1956

Present: Honorable W. D. Murray, Judge.

Counsel for respective parties present as before and trial of cause resumed.

Thereupon Raymond O'Keefe resumed the witness stand for plaintiffs, whereupon the deposition of Raymond O'Keefe was opened and filed, and the stipulation accompanying said deposition, for the taking of the deposition of Raymond O'Keefe, was also filed.

Thereupon Raymond Charles Hoynes, Phillip Vert and Dr. Robert M. Wiprud were sworn and examined as witnesses for plaintiffs, and an X-ray photo, marked Plaintiffs' Exhibit No. 29, was offered and received in evidence without objection, whereupon the witnesses Hoynes and Vert were permanently excused.

Thereupon Dr. Robert M. Wiprud was called out of order as a witness for defendant for the purpose of examination in connection with defendant's counterclaim, and Defendant's Exhibits Nos. 30, 31 and 32, being three X-ray photos, were offered and received in evidence without objection, whereupon Dr. Wiprud was permanently excused as a witness herein.

Thereupon Charles H. McChesney and Gene Seal were sworn and examined as witnesses for plaintiffs, and Plaintiffs' Exhibits Nos. 11, 12, 13, 14, 15, 16, heretofore marked, and Nos. 9 and 10, heretofore marked, were now offered, and received in evidence without objection.

Thereupon Wayne Long was sworn and examined as a witness for the plaintiffs, and Plaintiffs' Exhibit No. 8, heretofore marked, was now offered, and received in evidence without objection.

Thereupon H. E. Jacobson and Stanley J. Hould were sworn and examined as witnesses for plaintiffs and Plaintiffs' Exhibit No. 33, a bumper from an automobile, was offered and received in evidence without objection, and a sketch of a bridge, marked Plaintiffs' Exhibit No. 34, was marked for identification, whereupon further trial of the causes was continued until 10:00 a.m. tomorrow.

Entered in open Court October 26, 1956.

E. WARREN TOOLE,
Clerk.

[Title of District Court and Cause.]

Nos. 1798, 1799 and 1800

MINUTE ENTRIES,
SATURDAY, OCTOBER 27, 1956

Present: Honorable W. D. Murray, Judge.

Counsel for respective parties present as before and trial of cause resumed.

Thereupon Stanley J. Hould resumed the witness stand for plaintiffs, whereupon Pat West was called out of order as a witness for defendant and was sworn and examined, and William D. Dove and Douglas Hardesty were sworn and examined as witnesses for plaintiffs, and plaintiffs' exhibits Nos. 17, 19, 20, 22, 23, 24, 25 and 26, respectively, heretofore marked, were now offered and received in evidence without objection, and plaintiff's exhibit No. 18, heretofore marked, was now offered and received in evidence over defendant's objection, and plaintiffs' exhibit No. 34, heretofore marked, was also offered and received in evidence over defendant's objection.

Thereupon the envelope containing the depositions, sealed therein, of Gordon Joseph Jobin, George Edward Thompson, Armande Morand, and Thomas Edward Walsh was opened, and such depositions, and the stipulation for the taking of said depositions, were filed.

Thereupon plaintiffs offered in evidence the deposition of Armande Morand, the same was received in evidence without objection.

Thereupon plaintiffs offered in evidence the deposition of Gordon Joseph Jobin, and the defendant objected to that portion thereof commencing with line 20 on page 3 thereof through line 26 on page 5 thereof, and to that portion thereof commencing on line 13 on page 6 thereof and ending with line 4 on page 12 thereof, which objections were sustained, but otherwise said deposition was received in evidence.

Thereupon plaintiffs offered in evidence the deposition of Thomas Edward Walsh, and the same was received in evidence without objection.

Thereupon it was stipulated between counsel for the respective parties that the normal expectancy of a white male of the age of 47 years, the age and category of plaintiff Raymond O'Keefe at the time of the collision herein, was 24 years, and that the normal expectancy of a white female of the age of 36 years, the age and category of Mary A. O'Keefe (since deceased), at the time of the collision herein, was 37 years.

Thereupon plaintiffs rest, subject to the stipulation heretofore entered into and order of Court that plaintiff shall have the right at a session to be subsequently set by the Court to at a later date present rebuttal testimony orally or by deposition to the testimony of a certain witness for defendant not now available.

Thereupon Douglas Hardesty, heretofore sworn, was recalled and examined as a witness for defendant, whereupon further trial of the causes was ordered continued until Monday, October 29, 1956, at 9:30 a.m.

Entered in open Court October 27, 1956.

E. WARREN TOOLE,
Clerk.

[Title of District Court and Cause.]

Nos. 1798, 1799 and 1800

MINUTE ENTRIES,
MONDAY, OCTOBER 29, 1956

Present: Honorable W. D. Murray, Judge.

Counsel for respective parties present as before and trial of cause resumed.

Thereupon Alexander Johnson Fuzesy, Walter Schoepski and Mrs. Walter Schoepski were sworn and examined as witnesses for defendant, whereupon that portion of the deposition of Raymond O'Keefe, taken before R. L. Robertson, a Notary Public for the State of Montana, on October 12, 1956, commencing on line 6 of page 44 thereof, through line 25 of said page, was offered by defendant and received in evidence over the objection of plaintiffs.

Thereupon it was stipulated by counsel for respective parties that the normal expectancy of a male of the age of 60 years was 14.5 years, and that the value of \$1.00 for 5 years was \$4.5797.

Thereupon Dr. Duncan Stuart McKenzie, Jr., was sworn and examined as a witness for defendant, and an X-Ray film, marked defendant's exhibit No. 35, was offered and received in evidence without objection, whereupon the defendant and counter-claimant rests, subject to the stipulation heretofore entered into and the order of the court that defendant shall have the right at a session to be subsequently set by the Court to produce the evidence of Mabel Keough, who is not now available.

Thereupon Raymond O'Keefe, heretofore sworn, was recalled and examined as a witness for plaintiffs in rebuttal, whereupon plaintiffs rest, subject as aforesaid to present rebuttal testimony orally or by deposition to the testimony of said Mabel Keough at a subsequent session as aforesaid.

Thereupon further trial of the causes was ordered continued until Wednesday, December 5, 1956, at 10:00 a.m.

Entered in open Court October 29, 1956.

E. WARREN TOOLE,
Clerk.

[Title of District Court and Cause.]

Nos. 1798, 1799 and 1800

MINUTE ENTRIES,
MONDAY, JANUARY 14, 1957

Present: Honorable W. D. Murray, Judge.

Further trial of this cause was continued until 11:30 a.m. today, and thereafter at said time the same came on regularly for further trial, Messrs. Mark J. Doepker and Stephen Granat being present and appearing for the plaintiffs, and Messrs. Edward C. Alexander and Emmett C. Angland being present and appearing for the defendant.

Thereupon Mabel Keough was sworn and examined as a witness for defendant, whereupon defendant rests.

Thereupon William C. Dove, who had heretofore been sworn, was examined as a witness for plaintiffs, and an offer of proof made by counsel for plaintiffs was taken into Court Reporter's official record and denied by the Court.

Whereupon the evidence being closed, Court ordered that plaintiffs be, and are allowed 30 days after receipt of a transcript herein, then and there ordered by counsel, within which to serve and lodge with the Court their proposed findings of fact and conclusions of law and supporting brief; that the defendant be, and is allowed 30 days thereafter within which to serve and lodge with the Court his proposed findings of fact and conclusions of law

and supporting brief; and that the plaintiffs be, and are allowed 15 days thereafter within which to serve and lodge with the court their rebuttal brief, if any.

Entered in open Court January 14, 1957.

E. WARREN TOOLE,
Clerk.

[Title of District Court and Cause.]

Nos. 1798 and 1799

SATISFACTION OF JUDGMENT

Know All Men by These Presents:

That for and in consideration of the sum of One Dollar (\$1.00) and other valuable considerations to the undersigned, defendant and cross complainant in the above-entitled cases, in hand paid for and in behalf of the plaintiff, full satisfaction is hereby acknowledged of that certain judgment rendered in the above-entitled court, and filed, entered and docketed in the above-entitled causes on the 19th day of August, 1957, in favor of the above-named defendant and cross-complainant, and against the above-named plaintiff, for the sum of Forty-six thousand Two hundred twenty-two and 66/100 Dollars (\$46,222.66) and costs taxed, together with interest thereon at the rate of six per cent (6%) per annum, and I hereby authorize and

direct the Clerk of said Court to enter the satisfaction of said judgment of record in said actions.

In Witness Whereof, I have hereunto set my hand and seal this 12th day of March, 1958.

[Seal] /s/ WALTER SCHOEPSKI, A/K/A
/s/ WALTER SCHOEPSKI.

State of Wisconsin,
County of Rock—ss.

On this 12th day of March, 1958, before me, Pearl MacRoberts, a Notary Public in and for the State of Wisconsin, personally appeared Walter Schoepski, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal the day and year in this certificate first above written.

[Seal] /s/ PEARL MacROBERTS,
Notary Public for the State
of Wisconsin.

My commission expires June 14, 1959.

[Endorsed]: Filed March 24, 1958.

[Title of District Court and Cause.]

Nos. 1798, 1799 and 1800

NARRATIVE STATEMENT OF
PROCEEDINGS AND TESTIMONY

Appearances:

HARRISON & GRANAT,
Malta, Montana;
DOEPKER & HENNESSEY,
Butte, Montana,
Attorneys for Plaintiffs.

HALL, ALEXANDER & BURTON,
Great Falls, Montana;
ANGLAND & MARRA,
Great Falls, Montana,
Attorneys for Defendant.

Be it remembered that the above causes were consolidated and came on regularly for trial before the Honorable W. D. Murray, United States District Judge for the District of Montana, sitting without a jury, at Havre, Montana, on October 25, 1956. The plaintiffs were present in person and represented by their counsel, James T. Harrison, Esq., of Malta, Montana, and M. J. Doepker, Esq., of Butte, Montana; the defendant was present in person and represented by his counsel, Edward C. Alexander, Esq., Emmett C. Angland, Esq., and Joseph R. Marra, Esq., all of Great Falls, Montana.

Thereupon, the following proceedings were had:

APPELLANT'S CASE IN CHIEF

Mr. Alexander: May it please the Court, the defendant, with the understanding on those depositions, which the defendant is also interested in—we are, of course, still without [3*] the testimony of the witness, Mabel Keough, and I understand the Court has made some——

The Court: Well, I made the suggestion that I think we would proceed with the taking of testimony so that all of the testimony that is now available, at least, be presented to the Court, and that thereafter, at a date convenient, we could set a session to take the testimony of that witness who is not now available, and in that connection, I pointed out that after that witness testifies, counsel for the plaintiff may very well have some rebuttal testimony to present, and we would have to make arrangements for counsel to present that, either by way of taking the testimony of the witness here in Court, or by deposition, which ever he wanted to do.

Mr. Doepker: That is perfectly agreeable to our side, your Honor.

Mr. Alexander: With that understanding, the defendant is ready, too.

The Court: Very well, let us proceed then. [4]

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

RAYMOND O'KEEFE

Direct Examination

My name is Raymond O'Keefe and I live at Sandwich South in the Province of Ontario, County of Essex, near the larger city of Windsor in Canada.

I had occasion to be driving in the State of Montana on the 30th day of August, 1955. I was riding in a 1955 Buick, it was a four-door hardtop, and at the time the members of my family were my wife and two children, Catherine and Michael and my wife's name was Mary.

On the day in question, about 9 o'clock or 9:30, my wife was driving the automobile, and something of an unusual circumstances occurred, which happened at approximately 9:30 a.m. A car swayed in front of her, the place was 12 miles and some fraction of a mile, slightly over 12 miles westerly from the City of Malta, Montana. The automobile collision took place at a bridge. It was a wooden bridge with three length members, one on top, one in the center and one at the bottom.

Our trip started from the farm where I resided, and on this morning, we had driven from Havre where we had been the night before. We arose approximately 5:20.

My wife got our breakfast that morning at the motel where we were staying and we packed our luggage and put the luggage in the car. We did not have to stop for gas the evening before, but we got gas somewhere between Shelby and Havre. Our return trip from our farm in Canada started at

(Testimony of Raymond O'Keefe.)

the City of Seattle, Washington, and on this particular morning, my wife, Mary, was driving our automobile. It was a clear morning, and it was warm, and we were driving easterly from Havre. The children were in the front seat.

Mrs. O'Keefe had considerable experience in operating automobiles; she had been driving for several years, 10 or 12 years or more; we had been married for 10 years; and for the last 4 or 5 years before this date, she drove every day; her driving was both pleasure and business, and she also operated motor driven equipment, tractors and trucks; and Mary O'Keefe had reached the age of 36 on the 30th day of August, 1955.

I occupied a position in the center of the rear seat as we were traveling eastward that morning and we had no occasion to stop between Havre and this bridge that we are talking about. As we traveled eastward that morning I made observation of the distance that we had traveled and it was approximately 101 miles which we noticed at about a mile westerly from the bridge in question.

Approaching the bridge in question from the west, it was a fairly straight road, it does go down slightly to the bridge from the west. Leaving Malta, however, there were several bends in the road, and we observed the bridge in question on that morning at some distance from it.

A. Oh, I saw it for quite aways.

Q. Now, fixing that, what you call the start of that "quite aways," fixing that place in your mind,

(Testimony of Raymond O'Keefe.)

will you tell us first on which side of the highway, or which sides of the highway, Mary O'Keefe drove that Buick car that morning?

A. On the right hand side.

Q. To your best recollection, did she at any time while driving cross over on the other side for any purpose, on the left side?

A. Well, I don't recall, unless she passed someone. I don't remember that she did. There wasn't very much traffic. We met quite a few combines going west.

Q. Were those combines east or west of Malta?

A. West.

Q. With particular respect to the position, or the distance [14] that you have related when you said you could see the bridge from quite aways, I would direct your attention now to the operation of the automobile from the start of that point which you say was quite aways, until you arrived at the bridge. You have now related that she stayed on the right-hand side, as near as you can remember, is that correct?

A. That is correct.

Q. And particularly now, coming into the bridge on the highway, on which side was she driving?

A. The right-hand side.

Q. Give the Court your best recollection and your best judgment of the speed that she was traveling at that time and place?

A. Well, I would say 40 to 45. She may have slowed to 40.

Q. Now, will you say whether or not, Mr.

(Testimony of Raymond O'Keefe.)

O'Keefe, that she continued on her own or right-hand side as she came upon the bridge, or did she swerve away from her own or right-hand side as she came upon the bridge, or went through the bridge? A. No, she didn't.

Q. All right, now, directing your attention now to the traffic which may have been approaching at that time from the east, will you tell the Court whether you saw any automobiles in that immediate vicinity by the bridge coming from the east?

A. Yes, I did. [15]

Q. And what kind of vehicle or vehicles were they?

A. That would be this car that was in the accident.

Q. Did you observe any others in the immediate vicinity right at that time? A. No.

Q. All right, now, in your own words, please, tell the Court what you saw happen with respect to the car that was coming from the east?

A. Well, I saw it coming down this incline, and when it got very close to her, it seemed to sway right at her. I raised up in the back seat.

Q. Now, you have mentioned an incline which has not been explained to his Honor yet in the testimony, and where, with respect to that bridge, is the incline you were talking about?

A. Well, it is——

Q. Speak up now.

A. It is a couple hundred feet, I would say, maybe more, I didn't measure it.

(Testimony of Raymond O'Keefe.)

Q. And with respect to the bridge, does the incline—or where did it start on this day?

A. Well, it isn't too far back. I don't think it would be over 30 or 40 feet.

Q. And then the incline would go towards which direction? A. East.

Q. Before you saw the car coming down this incline, this car [16] that collided with you, did you see it beyond, down the highway to the east, at any time that you recall? A. No.

Q. Have you since learned whether that incline continues, or whether there are depressions eastward from the top of the incline?

A. I have.

Q. And what is the situation there?

A. From where you get back far enough, you cannot see the bridge over the incline.

Q. I didn't hear the last part of your answer.

A. Over the incline, you cannot see the bridge.

Q. Now, did you notice since any highway markers somewhere along that incline?

A. Yes.

Q. As to whether it was there on that occasion, do you know? A. I do not.

Q. But when was the first time that you had a chance to observe whether there were highway markers in that immediate vicinity?

A. The 15th of October.

Q. Of this year? A. Yes.

Q. Now, then, let's please relate in detail, as

(Testimony of Raymond O'Keefe.)

near as you [17] can recall what took place as the car that you referred to came over this incline and came toward you?

Mr. Angland: Just a minute. Read the question, will you, Mr. Parker?

(Question read back by Reporter.)

Q. Did you understand that question?

A. Yes.

Q. All right, I want you to describe your remembrance of the collision, how it happened, in some detail, please.

A. Well, as I saw this car coming at us, it seemed to be coming fast and swerved just before it got on top of her.

Mr. Alexander: Move that the answer be stricken as not responsive. The question was as it came over the incline towards you.

The Court: Overruled.

Q. Do you have some memory at this time from being there immediately following the collision?

A. I do.

Q. And do you have some memory at this time of the circumstances immediately before the collision? A. Yes.

Q. All right. Approximately, then, will you tell us where on the bridge the actual impact or collision took place?

A. Towards the easterly end.

Q. And in the instant immediately before the collisions, [18] where was the Buick car?

(Testimony of Raymond O'Keefe.)

A. Near the right rail.

Q. And where did the impact between the two cars occur, as near as you could tell in the instant that it occurred?

A. You mean in the position on the bridge?

Q. I mean the way the cars came together, as near as you can remember?

A. Well, as near as I can remember, his car hit her front end. [19]

I have had occasions since to observe photographs of the damaged cars and my counsel have obtained pictures of these cars.

In the collision, I was thrown over into the glass of the windshield or the side window somewheres, and when the car landed in the ditch, I removed the youngsters and asked Mary if she was hurt, she didn't answer and I got out and tried to move her and I couldn't; I walked back to see if the other car might have taken fire; those people were both sitting in the front seat; Mr. Schoepski, his leg was hanging out of the left side of the car; then I returned to our own car.

Immediately after the collision, the Buick car turned in a northerly or left-hand direction, into the ditch or barrow pit, as they call it. I made a casual observation of the position of the left front wheel and it had been driven upwards, I believe, and back.

Q. Will you say whether or not the movement of the Buick followed the crushed position of the front wheel?

(Testimony of Raymond O'Keefe.)

Mr. Alexander: Just a moment—Well, go ahead.

A. I would say yes, it did.

Q. Then it came to a stop where?

A. East of the bridge in this barrow pit.

Q. Now, then, immediately after this, what did you do besides speaking to your wife?

A. Well, I tried to take care of the youngsters as little as I could. This woman started coming and wanted me to lie down.

Q. How long did it appear to you, approximately, before any other vehicle showed on the scene?

A. Well, I would say at least five or six minutes. [21]

I observed the position of Mr. Schoepski's automobile immediately after the collision and it was on the bridge heading to the left at an angle to the south side, if the road was running west and the front end of his automobile was across the center line to the south. Immediately after the collision, my wife was in a sort of a standing position around the steering wheel, fairly well standing. I was loaded into an ambulance, I believe with Mr. Schoespki and I was bleeding from the forehead and hands, one hand was bleeding bad and the forehead and nose. I was laying on the ground and I heard somebody volunteer to take the children into Malta in a station wagon.

Q. Were you alone in the room in the hospital at that time? A. No, I was not.

Q. Who was in the hospital room with you?

(Testimony of Raymond O'Keefe.)

A. Mr. Schoepski.

Q. Did Mr. Schoepski say anything while you and he were in the room together?

A. Yes, he did.

Q. What did he say?

A. Oh, on the second day, I don't know whether he knew who I was or not, he wondered how the Milwaukee ball team was getting along. I heard him make a phone call. He did a lot of talking at night.

Q. Well, what, if any particular thing, did he say relating to the accident or the driving?

Mr. Angland: Just a minute. We will object to this; this isn't any part of the *res gestae*.

Mr. Doepker: Why does it have to be a part of the *res gestae* with the defendant saying it?

Mr. Angland: You are talking about admissions, then?

Mr. Doepker: Certainly.

The Court: The objection is overruled.

Q. You may answer, please.

A. Well, he made this—I don't know where I left off, but he made the phone call and said that there was nothing serious, [27] just a head-on collision; and at night he kept talking, he said I was too old, I never should have made the trip, so I got the nurse and complained about it. They moved me the next day. I couldn't sleep. [28]

The position my family were in the car as it left Havre was changed between Havre and the scene of the accident, Michael came back into the back seat where I was, and the little girl was asleep in the

(Testimony of Raymond O'Keefe.)

front seat, and I was sitting a little to the right of the center of the rear seat, and from where I was seated there was no obstruction to the view of the road ahead. At the time of the accident the condition of the weather was such that it was a clear morning, there was not any fog or anything to obstruct my view and there were no obstructions on either side of the bridge that could have obstructed my view, except there was that rise to the east, and there were no other cars in the immediate vicinity at the time of the collision, immediately before the accident.

I have been on the stand previously and was excused for the purpose of having some photographs introduced that were taken at the scene and subsequent to the collision.

Photograph No. 2 of Plaintiff's Exhibit 4 I recognize as an automobile that is to the left of the picture and headed down with some men standing around it, that is a picture of the Buick, my wife's car. I also recognize Plaintiffs' Exhibit 1 and that is also a photograph of the Buick car.

Plaintiffs' Exhibit No. 4 photograph 12 shows the automobile at the position indicated and No. 15 of Plaintiffs' Exhibit 4, I also recognize, and each and every one of those photographs and the position of the automobile is that of the same automobile—it is the same car.

If I take Plaintiffs, Proposed Exhibit No. 9 and look through the viewer, I recognize the vehicle in

(Testimony of Raymond O'Keefe.)

that Exhibit. That is the Buick. Plaintiffs' Exhibit No. 10, looked at through the viewer, I recognize as the Buick automobile.

After the collision, I have stated that I went back to the Pontiac car and at the time, I did not know the people that were in the car, but later I became acquainted. I have previously referred to a man seated in the Pontiac car with his leg hanging out and that man was seated behind the steering wheel and there was also a lady in the car with him, in the front seat.

Cross-Examination

Going back to the scene of the accident on the 30th of August, 1955, I stayed at Havre that night and we got up quite early that morning. My wife prepared breakfast. We had a good breakfast that was cooked right at the motel. I didn't have a watch, but there was a clock at the motel and that is how I know that we left at twenty to seven on the morning of the 30th of August.

As we went from Havre to the place where the accident happened, we passed some cars on that stretch of road. Our car was all gassed up west or southwest of Havre the evening before and we didn't have to make any stops to get gas. We drove right straight through without any stops up to the time of this accident and collision. I did not stop at a place called Choo Choo Inn in Malta. It is not a fact that we had breakfast in Malta at the Choo

(Testimony of Raymond O'Keefe.)

Choo Inn that morning and we did not stop at the Choo Choo Inn for any purpose.

We met some combines, I thought it was at Malta, but since I have gone back, it is a large steel bridge west of Malta, and the little boy was awake at that time. The little boy rode in the front seat of the automobile part of the time and where he started to ride in the back seat is pretty hard to tell—I don't know. In all events I was in the back seat all the way from Havre to the point of the accident. The little boy was not awake from Havre to the point of the accident, he was asleep towards the end. The little girl was asleep in the front seat.

As we came upon the bridge in question, I observed the bridge for quite aways.

Q. Now, as you came up to the scene of this accident, as I understand it, you observed the bridge at quite aways? A. Yes.

Q. But I never was able to tell how far away you were from the bridge when you first observed it. A. Well, I couldn't tell you now.

Q. Well, can you give me any estimation, approximately how far in hundreds of feet or tens of feet?

A. Oh, I would put it at four or five hundred feet.

Q. At four or five hundred feet. And at the time that the Buick was four or five hundred feet from the bridge, did you see any traffic coming from the other direction? A. No, I didn't.

(Testimony of Raymond O'Keefe.)

Q. You didn't see any traffic, that is coming westward. When was it that you first observed the Pontiac automobile?

A. I first noticed it as we were nearing the bridge.

Q. As you were nearing the bridge?

A. That's right.

Q. That is, the car that Mrs. O'Keefe was driving? A. Yes.

Q. Can you tell me about where your car, the car you were riding in, was when you first observed the Pontiac, in feet, let us say?

A. No, it is a pretty hard thing to do when you are moving. [155]

Q. Well, roughly, at least?

A. Oh, I would say 40 feet back or so.

Q. So, when the car you were riding in was 40 feet back to the west of the bridge you saw the Pontiac? A. Yes.

Q. Now, where was it that you saw the Pontiac with reference to the other end of the bridge or some natural object?

A. Coming from the east to the bridge.

Q. Was it about the top of the hill?

A. No, it was coming down.

Q. And how far down the hill would you say it was?

A. I have no way of measuring it.

Q. Pardon?

A. I have no way of measuring it.

Q. Well, would it be half way down the hill?

(Testimony of Raymond O'Keefe.)

A. I don't know the length of the hill.

Q. It doesn't matter how long the hill was, I just want to know if it was half way down the hill or a quarter of the way?

A. I would put it at about a hundred feet from the bridge or so.

Q. About a hundred feet from the bridge. And were you able to estimate the speed of the Pontiac?

A. Well, it seemed to be coming pretty fast.

Q. And at that time, the Buick you were riding in was going [156] about 40 to 45 miles an hour?

A. I told you that, 40 to 45.

Q. When you saw that Pontiac a hundred feet from the bridge, it was on its right side of the road, wasn't it? A. Yes.

Q. And it continued on its right side of the road?

A. Until it got near the bridge, or entering the bridge, one of the two.

Q. Well, which was it, did it get on its wrong side as it came into the bridge, or after it was on the bridge?

A. As it was coming in, I would say.

Q. As it was coming into the bridge?

A. Yes.

Q. And what did the Pontiac do then, just turn right towards you? A. Yes.

Q. I think you said—now, when Mrs. O'Keefe came on the bridge, you told counsel that she was right near the right rail?

A. I said she was about a foot from it.

(Testimony of Raymond O'Keefe.)

Q. About a foot is the distance that she was from the rail? A. As she entered the bridge.

Q. As she entered the bridge, and was she about a foot from the rail all the way along then?

A. I don't think so. [157]

Q. Pardon? A. I don't think she was.

Q. Did she get closer or farther away?

A. She seemed to crowd over.

Q. She crowded over even closer?

A. Yes.

Q. And at about what point on the bridge was it that she crowded over closer to the rail?

A. It is pretty hard to tell. It happened too quick.

Q. I realize that, but you tell me she crowded over even closer and I want to know about where it was on the bridge. That bridge is about 80 feet long. A. Yes, I know it is, maybe longer.

Q. Whatever its length is, it is quite a long bridge. Now, was your wife half way down the bridge when she got over even farther?

A. I don't think she was.

Q. She was still——

A. I think she crowded over shortly after she entered the bridge.

Q. Shortly after she entered the bridge.

A. She quite likely saw the other car, too.

Mr. Alexander: Now, just a minute. I move that that answer be stricken as not responsive.

The Court: That answer may be stricken. [158]

(Testimony of Raymond O'Keefe.)

Q. You think now she was close to the rail right when she got on the bridge?

A. I said a foot.

Q. A foot, and then she crowded even closer?

A. I have told you that, yes. [159]

Q. Now, when she crowded even closer, will you tell me what was the Pontiac doing at that time?

A. It was coming over the center.

Q. It was coming over the center. And how far over the center did the Pontiac come?

A. I am not in a position to tell.

Q. Well, was just the front end over the center, or did the whole Pontiac come over?

A. The front end was over when I got out after.

Q. I am not asking about after you got out. Let's just stick now to before the collision took place. Did the Pontiac turn so that only the front wheels went over the center line?

A. Yes, it turned.

Q. The rear wheels were on their own side of the road?

A. I wasn't in a position to see the rear wheels.

Q. You didn't see the rear wheels?

A. No.

Q. And this took place about where on the bridge, when the Pontiac turned?

A. It seemed to be about two-thirds of the way to the east end, around two-thirds of the way.

Q. In other words, the Pontiac had come one-third of the distance on to the bridge?

A. Yes.

(Testimony of Raymond O'Keefe.)

Q. And Mrs. O'Keefe had come two-thirds of the way?

A. True. That is what I thought when I went back and looked at it.

Q. Well, can you look at Picture No. 4 of Plaintiffs' Exhibit No. 4 and tell me if that is about the place on the bridge where the Pontiac swerved?

A. I would say that it is.

Q. And did the front of the Pontiac turn as much over the road as it shows in that picture?

A. Yes.

Q. Or was it more?

A. Well, it was well over at a good angle.

Q. Well, what do you mean by "well over"? A foot, or three feet, or ten feet?

A. I know it was over the center of the road.

Q. On what do you base that, what do you use for the center of the road, your eye or——

A. I would say that I did.

Q. I think, Mr. O'Keefe, when Court closed on yesterday afternoon, we were trying to ascertain how the Buick and the Pontiac collided. Now, before we go on with that, as the Pontiac came into the bridge, would you describe it as jumping around like a frog in water?

A. Well, I told you down in Great Falls that day that it seemed to jump at the Buick like a frog.

Q. It jumped at the Buick like a frog.

A. Well, it moved very fast.

Q. Now, it might help us to ascertain how the cars come together if you could just show the Court.

(Testimony of Raymond O'Keefe.)

I am interested, of course, only in the center line of the highway, and on the back of this tablet here, there is just a red line where I have put "W" to indicate the west end, and an "E" over here, it indicates the east end. Now, let's take this little 15 cents store red car, and let that be the Buick, and take this little yellow 15 cents store car, and let that be the Pontiac, and would you just step down here and show the Court, the red line being the imaginary center line of the bridge at the time of the collision, and show us how the two cars came together as you saw it?

A. Do you think that you could?

Q. I wasn't there, and I am sure that I couldn't, Mr. O'Keefe. Now, you were, you told me that the car swayed, other times you told Mr. Doepker it swerved, and I think it would help the Court if you just showed what you saw.

A. I'll try.

(Witness manipulates cars.)

Q. And you are now showing the Pontiac as curving right across the center line when you demonstrated there. Now, take the Buick, and put the Buick at about the place against the Pontiac where it was when the impact took place, if you know.

A. I would suggest in here somewheres (indicating).

Q. Now, is that about it?

A. Somewheres around there. It is a pretty hard thing for me to do.

(Testimony of Raymond O'Keefe.)

A. I was wondering if I had this car backwards. Somewheres in that position.

Q. Set the Buick about the way it was with reference to being parallel to the imaginary center line of the road at the point of collision.

(Witness demonstrates.)

Q. You have it set pointing a little bit toward the north. Now, the way the cars are now, is that the way the collision took place?

(No audible reply.)

Q. And you have placed the yellow car—have you finished, have you got it set? You have placed the yellow Pontiac sitting at an angle across the road of approximately 45 degrees pointed south-westerly?

A. Yes.

Q. And you have the Buick parallel to the imaginary center line of the highway with the left side of the front bumper of the Pontiac coming into collision with the left corner of the red Buick?

A. Well, I am just putting that there as near as I can. I didn't have very long to look at it when they were together.

Q. But I am asking you for your impression now.

A. And that is what I am giving.

Q. Now, that Pontiac, as it came down the hill from the east, and when it turned that way was traveling at a high rate of speed?

A. I thought it was; I have said so.

Q. And the Buick was traveling at a speed of 40

(Testimony of Raymond O'Keefe.)

to 45 miles an hour? A. Yes.

Q. And it is in that fashion that the cars came together as you have illustrated here?

A. To the best of my knowledge.

Q. Now, do you know what happened to the Pontiac after that time? A. I do not.

Q. Do you know of your own knowledge where the Buick went? A. Yes.

Q. What happened to the Buick, will you demonstrate how it proceeded?

A. Well, it went around through here (indicating). The front end of the Pontiac was cut off.

Q. The front end of the Pontiac was cut off?

A. Sliced across through here, smashed across.

Q. You are pointing now to the left front fender of the Pontiac—— A. Yes.

Q. As having been sliced off. Now, the Buick did what, while I hold the Pontiac?

A. It went around through here (indicating).

Q. With the rear end skidding to the south?

A. I suppose.

Q. If you don't know——

A. I know, there was marks on the rail.

Q. But about all you know is that the Buick passed beyond the Pontiac and down into the barrow pit on the north side?

A. Yes, there was tracks there.

Q. Now, as we—before the collision which you have just described, as I understand it, you were in the back seat of the Buick? A. I was.

(Testimony of Raymond O'Keefe.)

Q. And sitting about—where was it, somewhat to the right-hand side? A. Yes.

Q. Prior to this collision, do you know whether Mrs. O'Keefe applied the brakes?

A. I don't know.

(O'Keefe narrative resumes.)

I think Mrs. O'Keefe slowed the car, she generally did at a bridge. She slowed down and waited for a car at the bridge west of there, and on this particular bridge, I was watching what was happening and I was sitting back in the back seat with my back against the back cushion. I wasn't lying down; and from the position I was in the car I could see where the center of the highway was and I could see that right up to the time of the collision. When the Pontiac came onto the bridge, I had a view of everything ahead of me and I didn't see any other car following the Pontiac down the hill.

Q. Didn't you see any other car following the Pontiac? A. No.

Q. Down the hill? A. No.

Q. Calling your particular attention to what might be described as a laundry panel, there was no laundry panel? A. There was not.

Q. Did you see a Ford station wagon anywhere in the vicinity just before the collision?

A. I did not.

Q. And I think that you said that it was at least five or six minutes before anyone came on the scene? A. That is correct. [167]

(Testimony of Raymond O'Keefe.)

Looking at photograph No. 8 of Plaintiffs' Exhibit No. 4, we see a photo looking east from a point in the center of the highway about 500 feet west of the bridge.

Looking at photograph No. 8, it is a pretty hard thing for me to tell from this photo where it was when I first saw the Pontiac, but I will mark a letter "B" on the Exhibit, but I don't think it is very fair for me to try to mark on this.

(Then the witness does as suggested and draws a line crosswise at about the point and relates that it couldn't be accurate—it is because the photograph doesn't show the distance too well.)

Looking at picture No. 12 of Exhibit No. 4, I would say that the Pontiac was just coming over the top of the hill that shows in picture 12 of Exhibit 4. It would be back a hundred feet anyway from the bridge—at least a hundred feet—and at that time I think the Buick car was approximately 40 feet from the westerly end of the bridge. So that when the Pontiac was at least a hundred feet from the east end of the bridge, the Buick was 40 feet from the west end of the bridge; and when the Buick automobile came to rest in the ditch, the first thing I did was took the little girl out of the front seat—took the two children out of the car. I took the children out of the car.

Q. Up to this time, you had not spoken to your wife?
A. Yes, I did.

(Testimony of Raymond O'Keefe.)

Q. When did you speak to her?

A. When I was taking the little girl out, I asked her if she was hurt.

Q. And that was immediately after the Buick came to rest, you got out and spoke to your wife?

A. I spoke to her in the car.

Q. Is that the occasion that she moaned?

A. No.

Q. When was the occasion that she moaned?

A. When I tried to move her.

Q. And when was that?

A. After I put the youngsters out of the car.

Q. This is before you went back to the Pontiac to see if it was on fire? A. It is, yes.

Q. Did she answer at all when you spoke to her in the car the first time? A. No.

Q. You took the children up on the highway?

A. I put them out on the ground and then went around to her. [172]

Q. Now, when you took the children up on the highway, didn't a young lady meet you——

A. No.

Q. ——and help you with one of the little children? A. No.

Q. That did not happen. Then, you immediately went back to the Buick? A. I did.

Q. And at that time you spoke to your wife and she moaned? A. That's right.

Q. And then what did you do?

A. I came back and tried to comfort the youngsters.

(Testimony of Raymond O'Keefe.)

Q. And having done that, when was it you went to the Pontiac? A. After?

Q. You spoke to your wife, she moaned?

A. Yes.

Q. You came back and tried to comfort the youngsters? A. Yes.

Q. Then you went to the Pontiac to see if it was on fire?

A. I went to the Pontiac before that.

Q. Before you comforted the youngsters?

A. Yes.

Q. You didn't go to the Pontiac before you went to your wife and she moaned? A. No. [173]

Q. That was almost immediately after the car——

A. Well, it took a little while to get them out.

Q. But it was a matter of seconds?

A. Oh, it was a little while.

Q. Could you give me an approximation of the time? A. I couldn't.

Q. Pardon?

A. I couldn't. I had a little trouble opening the rear door, if I recall right.

Q. That is the door——

A. To the left, the rear door.

Q. Then you went up to the Schoepski car?

A. I did.

Q. And then you came back to your wife again?

A. I did.

Q. Now, you told Mr. Doepker that you put your wife's purse and some other articles in your

(Testimony of Raymond O'Keefe.)

pocket, or put something in your pocket, I believe it was your wife's purse?

A. I took the purse out of the car, the front, and a watch.

Q. And do you know which pocket you put the purse in? A. I don't.

Q. It wasn't your hip pocket?

A. It could have been.

Q. Are you sure that wasn't a glass bottle that you put in your pocket at that time? [174]

A. I am.

Q. After you had talked to your wife and taken the children up on the bank, did you take anything out of the Buick? A. I took some blankets.

Q. What did you take the blankets out for?

A. For the youngsters.

Q. That was immediately after you had taken them up on the hill?

A. No, after I came back.

Q. After you had come back from the Pontiac?

A. Yes.

Q. Now, didn't you go down to the Buick then and throw some bottles of the kind containing beer over the right-of-way fence in front of the Buick?

A. No.

Q. You did not do that?

A. Not to my knowledge.

Q. Well, if you had, you would have known about it, wouldn't you? A. I think so.

Q. You were perfectly conscious of all the things you have been telling us thus far?

(Testimony of Raymond O'Keefe.)

A. Yes.

Q. And although your face was cut, you could see the things you have been telling us about thus far? [175]

A. Yes.

Q. Had anyone had anything to drink that morning?

A. No.

Q. In the way of alcohol beverages of any kind?

A. No.

Q. Weren't there a lot of bottles in the back seat of the Buick

A. There was.

Q. And you didn't throw any of those bottles?

A. I may have dragged some out with the blankets.

Q. Were there any bottles or cases of beer in the trunk of the Buick?

A. I have been told there was a case of empties.

Q. Do you know?

A. I don't.

Q. That is just what you have been told?

A. Yes.

Q. That there was a case of empties in the trunk of the car?

A. Yes, I was told that.

Q. You had never seen that case?

A. I never bothered with the trunk of the car.

Q. Now, when you left from Havre that morning, you stayed awake all of the way from Havre to the point of collision?

A. I did. [176]

Q. There isn't any question about that?

A. There is not.

Q. Do you recall when your deposition was taken in Great Falls, in an unguarded moment,

(Testimony of Raymond O'Keefe.)

you said something about you getting the blanket to lay down and sleep? A. I did not.

Q. Well, you recall that deposition having been taken? A. Yes.

Q. At which time Mr. Doepker and Mr. Harrison were present, Mr. Angland, Mr. Marra and myself, and Raymond Robertson, the Court Reporter, in a room adjacent to my office in Great Falls on the 12th of October?

A. I brought that to Mr. Doepker's attention since I read that.

Q. Now, prior to reaching the place where the question in controversy arose, we had been talking about these beer bottles, and I will ask you if I didn't ask you the following questions and you make the following answers——

Mr. Doepker: Just a moment, your Honor, we object to this form of interrogation here because the proper procedure is not being followed. I think it is necessary for counsel to show that deposition to the witness and let him read it over and then ask questions about it.

The Court: Yes, I think you should.

Mr. Alexander: Shall we open the original deposition? [177]

Mr. Doepker: Your copy is okay.

Mr. Alexander: I have got some red lines on it.

The Court: You may open it.

Mr. Alexander: The deposition has been filed, has it not?

The Clerk: Filed unopened.

(Testimony of Raymond O'Keefe.)

Mr. Alexander: At this time, we would ask that the stipulation for taking the deposition, and the deposition of Raymond O'Keefe, after having been opened, be noted and filed with the Clerk of the Court.

The Court: It is.

Q. (By Mr. Alexander): Mr. O'Keefe, I now hand you your deposition which was taken at the time and place which I have related, and call your attention to page 44, starting with line 6, and going down to and including 21, and ask that you familiarize yourself with those questions and answers.

Mr. Doepker: Just a minute, all you have to do is familiarize yourself with it and then answer his questions as he asks them to you.

Q. Now, referring to that portion of the deposition, Mr. O'Keefe, I will ask you if I did not ask the following questions and you make the following answers: Question, Now, what kind of bottles were those? Line 7—

A. Beer bottles.

Q. No, I'll do the reading. Answer, Beer bottles. I thought [178] you lost the place. Question: And about how many were there? Answer: I don't know, I didn't know they were in there until that morning. Question: Have you any idea how they got there? Answer: Yes.

A. Yes.

Q. I'll do the answering. Question: How did they get there? Answer: Well I have a little lad at home that picks them up, and when he was around these

(Testimony of Raymond O'Keefe.)

motels, he thought he was getting something given to him, and he was hiding them in the car, and he was thinking he was going to sell them, and I got in the back that morning and I found the bottles when I got in to lay down and to move the blankets over and sleep, and I removed the blankets, and he had them covered up.

The Court: What's impeaching about this?

Mr. Alexander: I asked him if he hadn't indicated——

The Court: He said there were bottles in the back of the car.

Mr. Alexander: But we are talking about laying down to sleep, and I asked him if in an unguarded moment in Great Falls he hadn't said that when he got in the back to lay down to sleep, he moved the blankets.

The Court: Does he say in the deposition that he moved the blankets when he laid down to sleep?

Mr. Alexander: Yes, your Honor, I think he does. Line 19 is what I am referring to. [179]

The Court: Oh. Well, that question and answer. All the rest of it isn't impeaching.

Mr. Alexander: I simply wanted to orient him with the preceding questions.

Q. (By Mr. Alexander): Now, did I ask those questions, and did you make those answers which I read?

A. Can I—what about the next question?

Q. I am sure Mr. Doepker will take that up. I am asking you as far as we have gone.

(Testimony of Raymond O'Keefe.)

The Court: You can answer that yes or no, whether or not you made those answers, and then you can make any explanation that you feel called upon to make.

A. Well, I think you were——

The Court: Well, answer the question first. Was that question asked you and did you make that answer?

A. Well, I have changed it here.

The Court: That is not the question. The question is, at the time of the taking of this deposition, was that question asked you and did you make that answer?

A. I did not tell him that I laid down to sleep.

Q. Then you did not make the answer that is in the deposition, is that your answer?

A. That is my answer. [180]

The highway patrolman asked me about the ownership of the car that we were riding in. Whether he mentioned the ownership or not, I wouldn't say, but I gave him a statement. I did not tell the highway patrolman that I was the owner of the Buick. I am clear in my mind that there were no vehicles anywhere in sight at the time of this collision, and there were none there when I came back to Mr. Schoepski's car which would be for about 5 minutes.

Q. These empty bottles which were in the car, do you know about how many there were that you discovered? A. I do not.

Q. Were there any full bottles of beer in that car?

(Testimony of Raymond O'Keefe.)

A. I was told there was a full bottle in the trunk.

Q. A full bottle in the trunk, just one full bottle?
A. And a can, I believe. [185]

Q. You knew nothing about that?

A. I didn't.

Q. Now, you have told me that the morning of the accident there had been no alcoholic beverages consumed by you or by your wife?

A. That is correct.

Q. That night at Havre, from the time you got into Havre, had any alcoholic beverages been consumed by either you or your wife?

A. There was nothing consumed by her.

Q. At any time? A. No.

Q. Those beer bottles that were in the back of the car, do you know how they got there?

A. I do now.

Q. How did they get there?

A. The little fellow picked them up.

Q. That is the little boy who is here in the courtroom?
A. Yes.

Q. You had nothing to do with those bottles at any time?
A. No, I did not.

Q. Didn't the highway patrolman ask you about the beer bottles in the car?

A. He may have, I believe he did.

Q. And didn't you at that time tell him that you were saving [186] the beer bottles to take back to a boy in Windsor?
A. No, I did not.

Q. You didn't say that? A. No. [187]

TESTIMONY OF CLEO E. COLES

My name is Cleo E. Coles. I am a photographer in Malta.

I was a photographer in Malta on the 30th of August, 1955, and on that day the sheriff's office called me to a point which they said was about 10 miles or so east of Malta.

In response to that call, I made some photographs. I have with me the negatives of the photographs taken at that time.

From the negatives, I made some prints. I made them correctly. I put a number on each of the negatives which shows on the print. There are 15 different numbers.

I had the camera at eye level. That was around five feet in my base above the terrain I was standing on. In each case that was the position I took the pictures from.

I have a Crown Graphic camera made by Eastman Kodak. It is a recognized type of camera to take photographs with.

I would say that each and every one of the photographs correctly depict the scene at which the camera was directed at the time.

I took these pictures from around 10:30 to around 11:30 a.m. on August 30, 1955. I went about 12 miles east of Malta to a bridge (No. 4-3610-38.8) to take these photographs.

Print No. 1 of Plaintiff's Exhibit 4 is a photograph of a red Buick out at the scene. The red Buick was at the east end of the bridge in the

(Testimony of Cleo E. Coles.)

north barrow pit headed more or less north, I believe.

When I took the photograph, I was standing on the north top part of the barrow pit looking more or less down at it. The photograph correctly shows the conditions that there were there on that occasion.

Photograph No. 2 shows the extreme east end of the bridge and the red Buick in the barrow pit, and a wrecker and some debris from the wreckage. The debris is piled at the east end of the bridge on the north side. That also correctly shows the condition that obtained there at the time the photograph was taken. All these were taken from approximately five feet height.

Photograph 3 of the Exhibit 4 is a view looking west taken from the east end of the bridge, showing a Pontiac automobile, some wreckage, some people, and a line-up of vehicles waiting to get through.

When this photo was taken, I was in the center of the highway at the east end of this bridge with my camera pointed looking west. I was looking directly down the center of the highway.

This is print No. 4 taken also from the center of the highway looking east, and it was taken from almost the west end of the bridge, not quite. The camera was pointed east and this shows a wrecked Pontiac and people. I had my camera pointed directly down the highway easterly from the center of the bridge. This also correctly shows the condition as I observed it upon that occasion.

(Testimony of Cleo E. Coles.)

Print No. 5 was taken from the right hand side of the highway at a point in about the middle of the bridge. The camera was looking east and it shows the front end of the wrecked Pontiac, the wrecker, people, some vehicles. The vehicles were on the north side of the bridge and on the east end of the bridge.

My camera was about 5 feet high. On the right hand side of this photo there is some splintering of the rails and part of the bridge timbers. They appeared to be fresh and this correctly shows the splintered condition on that side.

I saw some red paint on those timbers.

Print No. 6 is a general view of the highway, bridge, and vehicles. The camera was pointed approximately northwest, and I was back about a hundred feet from the east end of the bridge. I was off in a field south of the highway east of the bridge. This photo shows the south rail of the bridge and a wrecker, station wagon. I am quite sure there is an ambulance.

Print No. 7 was taken from the center of the highway at a point about five feet above it. The camera was looking west, and it was about 500 feet from the bridge.

There is a sign on the right hand side of this photograph, a triangular sign. It correctly shows the relative position of that sign from the position. I have just stated I was in this position from the sign. With respect to the rest of the conditions

(Testimony of Cleo E. Coles.)

and what appears to be in the photo, it correctly shows the scene as I took it on that morning.

In print No. 8, the camera was over the center of the road, Highway No. 2, about five feet above it, and it is looking east, and approximately about 500 feet west of the bridge, looking east. My camera was directed approximately directly down the highway.

It correctly shows the highway to the west of this bridge as it existed at that time.

Print No. 9 is a picture that I took. It shows the bridge. The camera was looking north at a point about 250 feet south of the bridge.

Print No. 10 is looking south from a point about 250 feet north of this bridge. It shows the bridge, the creek, and the power pole and some people.

Print No. 11 is a picture of the bridge. The camera was looking west, and I stood at a point in the center of the highway about 19 feet from the east end of the bridge, and held the camera about five feet high, five feet above the road. There is a Pontiac with a wrecker in front of it.

Print No. 12 shows the bridge, the north and south rail, approximately half of them, or less than half of them. I stood in the middle of the bridge, and the camera was pointed east, northeast at the time. It shows the red Buick in the barrow pit, the wrecker, and some other vehicles. The splintered part of the timbers are on the south side of the bridge. The Pontiac had been removed. There

(Testimony of Cleo E. Coles.)

were paint marks on the timbers at that time. The paint was red.

Print No. 13 is taken from the south side of the bridge looking up and north at the railing of the bridge, and showing the splintered condition as it is shown from that side, the south side. It appeared to be fresh.

Print No. 14 was taken in the field west and south of the bridge a photograph of the Pontiac after it had been removed and showing a crushed front end.

Print No. 15 of Plaintiffs' Exhibit 4, and I took it in Malta. It shows the wrecked Buick, the left side of the wrecked Buick, as the wreckers pulled it in. A wrecker is still holding it up in position.

Plaintiffs' Exhibit No. 6 is an enlargement from a section of Picture No. 5 of Exhibit No. 4, showing the south rail of the bridge and the splintered condition and the marks on it.

Plaintiffs' Exhibit No. 7 is an enlarged section of Picture No. 7 of Exhibit 4. There is no distortion whatever. It is larger, easier to see.

Plaintiff's Exhibit No. 8 is the front of Schoepski Pontiac.

Plaintiffs' Exhibit No. 9 is a picture of the O'Keefe Buick, the front end of the O'Keefe Buick.

Plaintiffs' Exhibit No. 10 shows the O'Keefe Buick from the left side, the left side of the Buick.

Plaintiffs' Exhibit No. 11 shows the O'Keefe Buick. It is kind of a three-quarter front view looking towards the rear and right side of the Buick.

(Testimony of Cleo E. Coles.)

Plaintiffs' Exhibit No. 13 is of the O'Keefe Buick taken at the same time and place, a three-quarter rear view of the right side of the Buick.

Exhibit No. 14 is a closeup of the right front fender of the O'Keefe Buick.

Plaintiffs' Exhibit No. 16 is a photograph of the O'Keefe car right side, closeup, near the center of the car. There are some white streaks.

Mr. Alexander: That was my next question. On all of these pictures, I take it that you are simply stating that they represent the picture you took?

A. Yes, sir. [71]

Mr. Alexander: And you have no knowledge as to whether the situation is the same situation as prevailed before you got there?

A. No, I don't know that. [72]

Direct Examination

Photograph No. 17 of Plaintiff's Exhibit 4 is about 45 feet from the east end of the bridge, the south rail.

Photograph No. 18 shows the south bridge rail of this bridge we have been talking about, about 45 feet from the east end of the bridge at the south side.

Photograph No. 19 is the south rails of this bridge, about 40 feet from the east end of the bridge.

Photograph 20 is the south rails of the bridge, about 40 feet from the east end.

Plaintiffs' Exhibit No. 21 is an angle view of

(Testimony of Cleo Coles.)

the south rails of the bridge showing from about 20 feet to about 45 feet from the east end of the bridge.

Plaintiffs' Proposed Exhibit No. 22 shows the south rails of this bridge, about 30 feet from the east end of the bridge, closeups.

Plaintiffs' Exhibit No. 23 shows the rails on the south side of the bridge about 25 feet from the east end of the bridge.

Plaintiffs' Proposed Exhibit No. 24 shows the south rails of the bridge, looking southeast, the entire rail.

Plaintiffs' Proposed Exhibit No. 25 shows the entire bridge looking west in 3-D.

Plaintiffs' Exhibit No. 26 shows the entire bridge looking east, both rails.

Each and all of these exhibits correctly depict the portions of the bridge that I have identified as of the date upon which they were taken. They were taken on November 18, 1955, about 9:30 a.m.

Cross-Examination

The red marks on the bridge started somewhere near the easterly end, toward the easterly end. They extend from about 40 feet from the end of the bridge to about 20 feet from the east end, and they cover a portion of about 20 feet on the bridge.

These transparencies which were last identified as being Plaintiffs' Proposed Exhibits 17 through 26, inclusive, were taken on the 18th day of November, 1955. Mr. Harrison requested them to be

(Testimony of Cleo Coles.)

taken. He did not go out there with me and point out the particular things that he wanted the photographs taken of.

I have never made any transparencies of the north rail of the bridge.

In respect to Photograph No. 11, and paying particular attention to a mark which appears above the right rear bumper or fender of the Pontiac there, I do not recall that mark. I wouldn't be able to say whether that was a gouge or not. By enlarging a small portion of Photograph No. 11, it probably could be told what it was. I don't know whether you could tell whether it was fresh or not.

Paying attention to Picture No. 12 in Plaintiff's Exhibit No. 4, and to the top bridge rail in the extreme left hand side of the picture I cannot tell what that is. I observed that there were fresh splintered wood on the south rail of the bridge. I don't remember whether or not I made any effort to ascertain whether there were splintered wood or anything of that kind on the north rail.

There is a smear on the negative of Picture No. 12 as well as on the print. That smear is definitely something that was there when the picture was taken, and it is not just an imperfection in the print of 12.

Looking at the print of No. 11 and to the mark near the fifth post on the right hand side of the picture at the top rail of the bridge, it does appear in the negative, so, it is something that was on the bridge rail, and not just a smear in the print.

(Testimony of Cleo Coles.)

When I got out there to the scene of the accident, I don't know what had been done by way of moving any of the vehicles or anything of that kind.

I measured the extent of the red marks, the 40 feet, on November 18, 1955, about 9:30 in the morning. As my memory serves me, they seem to be about the same place.

With respect to any of these pictures in Plaintiffs Exhibit 4, 1 to 15, inclusive, using the camera which I used on that day, if you hold the camera level and there is no ups or downs in the terrain, why 25 degrees would cover it. I imagine that is about 20 feet, but I am not sure. It covers 25 degrees. That would be, oh, around 15 or 20 feet, I just imagine, from where I stood at 5 feet.

Well, now, in the process of photography, the method of holding the camera makes quite a little difference, doesn't it, as to precise details, and particularly as to foreshortening and lengthening distances, it can be exaggerated.

Print No. 4 of Plaintiffs' Exhibit 4, and Print No. 5 show the foreshortening in number 5 of some of those posts.

This sleeper rail along here, or the large timber right next to the highway at the right hand bridge rail as you look at this photograph, I didn't measure it for width. Showing that timber in 5 and the same one in 4 there is a difference in perspective. I don't think it is distorted. It wouldn't mislead me. It can give an exaggeration. The human eye can exaggerate too. I try to avoid that when I am

(Testimony of Cleo Coles.)

taking pictures, exaggeration. While I try to avoid exaggeration, I sometimes get it.

On that day, all the pictures were taken in my attempt to get everything that was to be found, free lance.

Redirect Examination

I was using what is known as a normal focal length lens for that size picture. The picture was four by five inches and a normal lens has a focal length about equal to the diagonal of a four by five picture. It has a five and a half inch focal length lens.

These photographs look about the same as they do to a human eye at a viewing distance of 14 inches from the photograph. That is known as normal. The picture is normal at about 14 inches, which means the same as to your eye.

Recross Examination

He asked me about the perspective. That is what I was talking about. I don't call them distortions, I call it perspective. It can be exaggerated or not exaggerated. It is certainly normal from the viewing distance that you are viewing it from.

It is normal perspective, which is entirely different from 3-D or space viewing. Perspective is the converging of lines, or diversion in a photograph, whether it is spread out or close. I don't think the convergence of lines is different looking at it with one eye than two eyes. Our 3-D pictures are

(Testimony of Cleo Coles.)

the same, each one, except that they have a difference in parallax or a difference in position, one eye is in a slightly different position than the other eye, about two and three-quarter inches, I believe, in the normal eye, distance apart, so we see two different pictures.

The camera takes in about 35 degrees normally. The human eye—I am not prepared—I think about 90, you should begin seeing your hand somewhere out here (indicating) if you are looking straight ahead. They test you for that in flying.

As to whether you then get a different perspective on what you see, depending upon the width of your vision, I am not an optician, I couldn't tell you.

I know what perspective is, yes, sir.

TESTIMONY OF VERN KAPPAN

My name is Vern Kappan and I resided about 12 miles northeast of Saco on August 30th, 1955. Saco is east of Malta about 30 miles. On the 30th of August, in the early morning, I had occasion to drive from my ranch towards Malta and I arrived at the bridge at the easterly end of the lake around 9—10 o'clock—somewhere between 9 and 10. I was going west in a pickup. It was a Ford pickup. My son was with me at the time. I have heard in the courtroom some testimony concerning a wreck that occurred on a bridge and I am familiar with the bridge in question, and I had occasion to drive up to that bridge or close to that bridge on

(Testimony of Vern Kapphan.)

that morning. We drove pretty fair, there must have been 6 or 7 cars between us on the highway when we drove out there to the east of the bridge. There was some cars on the east side and some on the west side too. There was a Buick car in the north barrow pit, headed north. That would be on my right hand side as we were coming. I saw the cars in the vicinity of the bridge. There was another car right on the bridge.

It was a Pontiac. At any rate there was a car on the bridge itself. There were quite a few people there. There was two children lying on the bank on the highway. There was a lady there and I think there was a man laying there. There was a man and woman laying on the highway, or side of the highway, on the west side of the bridge. I did not see the people enough to recognize who they were. When we came up there in our car, we walked over. We left our pickup in line with the rest of them and walked on up—walked right on to the bridge. We stopped a minute or two there by the east of the bridge where the children were and where the Buick was in the ditch, and then I walked right on clear across the west side of the bridge. I never went off of the road. They said that there was a woman in the Buick, but I never went down to the car.

Q. All right. Then, when you went towards the west side of the bridge, did you come up to where this automobile was? [106]

A. Yes, sir, that's right.

(Testimony of Vern Kapphan.)

Q. Now, Mr. Kapphan, tell us where that automobile was as you walked up to it?

A. Well, it was pretty close to the center of the bridge. It might have been a little further to the east side than it was to the west side, but it was further south than it was on the north. I would say the front end of the car was over the white line, as we call it.

Q. Now, are you still talking about that car that was on the bridge?

A. Yes, sir, I am speaking of the car that was on the bridge.

Q. And its position with respect to the white line was that the front end was where?

A. The car was setting at a little angle. The front end, I would say, was over the white line. I don't know whether there is a white line right on the bridge or not, but it was setting far enough there is no doubt it, it was over half ways, because when Bill came with the ambulance, I took a hold of the fender which was laying out there and pulled it back, and several other guys took a hold with me, and I think we moved the car a little bit so he could get through with the ambulance.

Q. When you moved the car, which direction was it moved? A. North.

Q. And before it was moved to the North, approximately what [107] portion of that Pontiac car was over the center line or on the south of the line? A. The front end.

Q. The front end. Now, after you moved this

(Testimony of Vern Kapphan.)

Pontiac car at the time the group of you moved it, what did you do with respect to any part of the Pontiac car?

A. Well, there was some pieces of some car that we moved out of the road there, but I wouldn't know whether they were off of the Pontiac or whether they were off of the Buick.

Q. I see. What pieces were they, do you know?

A. Well, that is pretty hard to say, as far as that goes, but there was pieces broke off of either car, I don't know which car.

Q. Did you see the photographer there at the time you were there?

A. No, sir, he wasn't there while I was there that I seen him. [108]

Looking at Plaintiffs' Exhibit 4, photographs 3 of 4, I would say that that was the car setting on the bridge and compared to the picture after it was moved by the four men, we moved it straighter. We moved the front end over and picked the fender up so that he could go through. After the Pontiac was moved from the south side, there was somebody drove through there and the man that drove through was the coroner, Bell.

After they picked the bodies up, we started going through with the car, and I was on the west side talking with one of the neighbors and the boy came along with the pickup and I got in and we went on to town.

VERN KAPPHAN

Cross-Examination

I couldn't tell you right to the inches or feet how far over the white line to the south that the automobile on the bridge was when I saw it. I didn't measure it, no. There wasn't room enough for a car to go through there. That is why the traffic was held up. There wasn't room to go through until we moved the car. I don't know how many of us moved the car, there were lots of men standing around there, and I couldn't say particularly that I knew any of them that took a hold of the car outside of me. I didn't pay that much attention.

By the time I got down to the car there must of been fifty people there on the bridge.

I have lived in Saco, oh, thirty years. I do not know any of the persons who helped me move the car nor any particular neighbor right around close. There were two or three of them there, but I wouldn't say they helped move the car. Of course, the reason why I wouldn't say is because they was all elderly men. I say the neighbors I seen there, I wouldn't say they helped, although they might have. I don't know. The neighbors that I knew around there were McChesney and John Mangus. Mangus was driving his Studebaker; McChesney, a Buick. I would say the front end of the Pontiac was five or six feet away from the south rail before I moved it. It would be close enough that they couldn't get through with an outfit. Just impossible to drive a

(Testimony of Vern Kapphan.)

car through there until it was moved. After we moved it, I laid the parts back down on the road. That is as far as I did. I just moved them out of the road so we could get through with the ambulance. What I moved was right beside the Pontiac. I wouldn't say that there was a white line on the bridge and I wouldn't say there wasn't. I don't know.

Q. That is fair enough. Before the car was moved now, and directing your attention to Photograph No. 3 of Plaintiffs' Exhibit No. 4, will you tell us where that fender was—apparently that is a fender, isn't it, that I am pointing to in the center of that picture——

A. Yes.

Q. Where was that fender before you moved that automobile?

A. It was laying about right here (indicating), it was laying pretty close there, I would say, but I don't see how it could have been, though, after we moved it. We moved it and he went through with the ambulance, I am sure, before the picture was taken, because I didn't see Mr. Coles there.

Q. Well, your testimony is that——

A. We picked that fender up and he drove through there.

(Testimony of Vern Kapphan.)

Q. And then you picked up the front end of the car and moved it?

A. I didn't say we picked it up, we just shoved it over.

(Testimony of Vern Kapphan.)

Q. Did you see the condition of the left front wheel of that Pontiac when you shoved it over?

A. No, sir.

Q. You didn't. After you shoved it over, did you note [113] whether or not the left front wheel of that Pontiac gouged or marked the highway?

A. No, sir.

Q. You didn't. Well, possibly I can direct your attention to the left front wheel to some extent here to refresh your recollection. [114]

The Court: Is that about the position of the car as you left it after you moved it, as shown in Picture No. 3?

A. No, I think it was a little straighter than that.

The Court: He said he thinks it was a little straighter than that. When you moved it, was it over closer to the south rail?

A. It was setting so he couldn't get through. Right the way it is setting there, with the fender picked up, you could drive through there.

The Court: So, this car pictured in No. 3 is not in the same position that it was when you first saw it?

A. No, it is touching the rail here. I don't think it was touching the rail when we come there, I wouldn't say.

In picture No. 3 of the Plaintiffs' Exhibit No. 4, it appears that the Pontiac is touching the rail and it wasn't touching the rail when we came there. As to the markings on the bridge, I couldn't tell

(Testimony of Vern Kapphan.)

you whether either side was marked because I didn't observe the railings of the bridge.

Observing photograph No. 5 of the Plaintiffs' Exhibit No. 4, well, the front was smashed up but whether it looked exactly like that, we did not pick it up, we just slid it over and moved the stuff out of the way so he could get through with the ambulance. I did not look afterwards to see whether or not you had marked the bridge or the pavement and I don't know whether or not the left front wheel or the left front tire had been cut off the rim of the wheel so that the rim was resting on the pavement.

Q. Well, where was that fender that is shown in both Photographs numbered 3 and 5 of plaintiffs' Exhibit 4, where was that fender before you moved the car? [115]

A. Laying right alongside of the car, back here a little further, I would say.

Q. Well, you moved this front, you say, back?

A. Yes, we moved it back.

Q. And I think your testimony is, and I am directing your attention to Photograph No. 5, your testimony is that it was impossible for an automobile to pass between the south rail of the bridge and the front of this car before you moved it?

A. That's right.

Q. That was impossible, that is what I wanted to know. If you knew that a 1955 Buick drove through there, you wouldn't believe it, would you?

(Testimony of Vern Kapphan.)

Mr. Doepker: Just a moment now, that assumes a fact not in evidence. The Buick was through when he got there, the Buick was already through.

The Court: Sustained.

A. The Buick was through when I got there, Mister, and in the ditch.

Q. Well, then, you don't know whether the Pontiac was moved back south before these pictures were taken?

A. That Pontiac could have been moved a dozen times after them pictures were taken if he took them after I was there, which he had to do, because I wasn't the first man there. We had picked the people up, or someone else had, I didn't touch any of them, but they was picked up and went ahead into [116] town before we left there, and I didn't see Mr. Coles around there at any time I was there, so that car could have been moved after I left there, too.

Q. Now, directing your attention again to Photograph No. 5 of Plaintiffs' Exhibit No. 4, the Buick is in the ditch—I think you can see just a little of the back end of it——

A. That car was moved there after I——

Q. Well, just a minute, will you just—I am talking about the Buick here now. A. Yes.

Q. It was in the ditch here, wasn't it, when you first arrived on the scene? A. That's right.

Q. Yes. What kind of a car was parked at the head of the line there?

(Testimony of Vern Kapphan.)

A. I couldn't tell you that.

Q. You couldn't? A. No, sir.

Q. Do you remember whether or not there was a car parked on the left side——

A. There could have been.

Q. Of the entry of that bridge?

A. There could have been.

Q. You don't know? A. No. [117]

Q. Well, will you tell me whether or not you saw a green Ford station wagon there?

A. Yes, there was a station wagon picked somebody up there. I think it was a lumber yard man in Saco.

Q. The lumber yard man in Saco?

A. At least, a man had a station wagon there and picked some people up.

Q. I see.

A. But I don't know whether he was in the head of the line, or where he was. I don't know that.

Q. Is your son in the courtroom?

A. No, sir.

Q. Is he available to testify?

A. No, he went east with cattle.

Q. Did you see a small panel truck, laundry truck, at the east end of the bridge when you came up there?

A. No, I don't recall that. It could have been.

Q. You remember you said in answer to Mr. Doepker's question that there was a girl taking care of the two children?

(Testimony of Vern Kapphan.)

A. Yes, there was a woman.

Q. Do you know who she was?

A. No, sir, I don't.

Q. Mr. Kapphan, did you move the back end of the Pontiac? A. I would say no.

Q. That wasn't moved? [118]

A. I would say no, not while I was there. This picture there (indicating), that car has been moved a lot since we first moved it, when that picture was taken.

Q. This car had been moved quite a lot?

A. Oh, yes, this car here was moved quite a bit since when we moved it. That has been moved since this picture was taken, I would say, unless it was like you boys was explaining, the width of it.

Q. You think the car was moved between this picture and that one?

A. Well, it looks that way, don't it?

Q. I don't know. You are the witness.

A. Well, unless it was like you were explaining the angle of it there on it, it doesn't look the same.

Q. It doesn't look the same to you?

A. No, I don't, unless you are setting on an angle like he was talking about, the angle of the lens of the picture.

Q. Was the automobile that you have been looking at in these photographs facing in the same direction when you first got there that it appears to be facing in in those pictures?

A. It was setting on an angle like that on the bridge.

Mr. Doecker: You have to stand up there and show it so the Judge can see.

A. It was standing on an angle on the bridge just about like that, I would say (indicating). It was headed about what [119] you would call west, I would say, I wouldn't know. [120]

RAYMOND CHARLES HOYNES

Direct Examination

My name is Raymond Charles Hoynes. I am a highway section man and I was engaged in that work on the 30th of August, 1955. My station was Malta, 14 miles east to Malta, and 26 miles west on No. 2, and I was working at the station for the highway department on the 30th of August, 1955.

I am acquainted with the bridge that is located toward the easterly end of Bowdion Lake and with respect to Malta the bridge is approximately 12½ miles (twelve and one-half) east and northeast of Malta. I had occasion to go over that bridge on the morning of August 30th, 1955, and on other days too, and I know the railings of the bridge enough to know something about their condition. When I came through on the morning of August 30th, 1955, and I know the condition of the railings on each side of the bridge, that morning and the direction of the bridge in that vicinity approximately runs east and west; and as I went out over the bridge that morning I noticed the railing on the south side or the north side as I went through.

(Testimony of Raymond Charles Hoynes.)

I can tell the Court that I observed both sides. We do every time we go over them bridges, it is part of our job to look out for anything unusual and on that morning I would say approximately 9 o'clock that I crossed the bridge going east and I went approximately a mile and a half to the end of my section east past the bridge and on that morning the south rail of that bridge were clear of any marks, they were clear of any markings with exception of a sliver off or something where it may have done it with a snow plow. As far as the railings and the boards that went along the south side of that bridge, they were free from any scuffing or splintering that would be noticeable to just casual observation and there were no paint scrapings on the bridge as I went over it that morning. When I returned from my trip about a mile and a half or two from the east, I saw this accident when we came up over the hill. When I say accident, I did not see the accident happen, I saw the result of the accident after it had happened. When I came upon this accident after it happened, then we just had the one vehicle. We pulled it off to the side of the road and went down to see what the accident consisted of. When I got there, I did see people around there. I mean that where the accident was, there were the people that were involved in the accident. We saw two little children on a blanket on the shoulder of the road right at the end of the bridge and on the other end of the bridge there

(Testimony of Raymond Charles Hoynes.)

was the woman laying on a blanket on the west end of the bridge on the shoulder of the road. I saw the cars that were involved in the accident, but I did not make too close an observation of the cars. I seen there was one in the barrow pit on the east end of the bridge and the other car was on the bridge. I just casually looked at the automobiles because there was quite a bit of trouble with traffic and I had to take over the traffic situation. There were several men walking around there and I saw a man walking around there that had apparently been in the accident and that was Mr. O'Keefe. He had blood running all down his face and he had a cut over his eye or some blood running down his face. I just walked past him when I went past the vehicle to get a bar out of our vehicle to try to open the door of the Buick.

When you direct my attention to picture No. 12 of Plaintiffs' Exhibit 4 and looking at the railing that appears on the right edge of the photograph here and I remember that railing that morning. The railing was not in that condition which appears in that photograph when I went through the bridge there that morning going east, but it was in that condition when I came back. I notice that there is a vehicle apparently that is at the east end of the bridge on the north side and I recognize it. When we came back from the east I noticed that vehicle shown in the picture. I couldn't say for sure looking at picture No. 13 of Plaintiffs' Exhibit 4, but as I said before, the bridge was splintered up some, maybe due to the snow plow or something that

(Testimony of Raymond Charles Hoynes.)

rubbed it, but I don't know, I don't think there was anything on that lower railing before the accident. At any rate, I did notice this middle railing after the accident and did see a condition such as shown here. I direct my attention to photograph No. 3 which is looking west and picture No. 4 of Plaintiffs' Exhibit 4. I notice the railing along the north of this picture now. Picture No. 4 of the Exhibit 4, we are looking east and I observe a car on that bridge at the time the picture was taken and with respect to the railing along the north of that bridge, I did not notice any splintering or paint scratches on the north side of the bridge.

Having my attention directed to photograph No. 7 of Plaintiffs' Exhibit 4, I look at it and notice that the direction that we are looking in that picture is west and I observe a sign that appears to the right of the highway which I am familiar with, and on that morning as I went east, the sign was there and it had been there for sometime before that date and I know what the sign said. It says "Narrow Bridges in the Next 10 Miles." I had passed over this area a good many times in my work and there is nothing to obstruct the view of a person approaching along that road. There is a little rise in the road further down, but you can see that sign for several hundred feet and by the shape of it, I know that you know that it is a warning sign. It is triangular and it is set in a triangular position being a warning sign. It is a standard

(Testimony of Raymond Charles Hoynes.)

sign and a warning over the highways. At the time I arrived there they were removing one of the children. They put the child on a blanket out on the east end of the bridge on the north side and this other woman they had carried her up to the other end there and she was lying on a blanket on the shoulder of the road there. I also saw a woman in the red Buick on the east end of the bridge. I went up pretty close to the car and I saw her. She was crumpled up under the steering wheel of the car and was still alive at that moment, but we couldn't get the car door open. Some of the boys were trying to open the door and they couldn't get the door open, so I returned and went back to our truck to get a bar to open the door. At the time I first saw her, which was after we pulled up there, the children were on the shoulder of the road and another lady was being taken over to the west side. That lady was still alive.

With respect to the south side going back to the south rail, I will tell the Court there was no paint smudges or spots of paint on the south rail that morning when I went out and that when I came back they were there and the color of those paint smudges were red.

Calling my attention to Plaintiffs' Exhibit No. 21 which is a stereoscopic color picture, I recognize it. It looks like the north end of the bridge. The north side of the bridge, let me look again, yes, it is the south side looking at it from the east.

In Plaintiffs' Exhibit No. 7, it was taken at the

(Testimony of Raymond Charles Hoynes.)

same time there but I don't exactly recognize all those markings and someone standing there. I am familiar with the section from the east end of the bridge on the south side back 6 or 7 posts. The last time I paid attention to them was 3 or 4 days ago and there are paint smudges there at the present time and I have been familiar with those paint smudges about a year with reference to the accident, and the first time I saw them with reference to the accident was the morning of the accident.

Cross-Examination

When I came over that morning about 9 o'clock, I was in a highway truck and I travel about 30 or 35 miles per hour just going along the road which we were on that morning. I drove over the bridge that morning about 30 or 35 miles per hour just about. I was not making any particular minute inspection of the bridge as I went by at that speed. Just to see that there had been no accident or anything and there wasn't anything particularly unusual about it that morning.

Three or four days ago when I looked over the road, when I examined the bridge, I was just looking over the road just the same as we have been and there were some paint smudges still there.

When you asked me if I wouldn't say that all the paint smudges on the south rail of that bridge, at the present time, had been there ever since the accident, well, I couldn't prove that it was, but I haven't seen any different from the time of the

(Testimony of Raymond Charles Hoynes.)

accident up till now, and refreshing my recollection a little as to whether there is orange paint smudges on the south rail of that bridge at the present time, well, you could call it orange if you wanted to maybe, red paint rubbed along on white paint would make a sort of an orange paint. White on red will make orange pretty much so. This particular paint that I saw on the morning of the accident immediately after the accident, I can't say if there was orange, but there was red paint on the bridge. As to the particular paint that I saw on the morning of the accident, immediately after the accident, I can't say that it was orange, but there was red paint on the bridge.

Q. This particular paint that you saw the morning of the accident, immediately after the accident, was it orange in color?

A. I can't say as to that, if there was orange, but there was red paint on the bridge.

Q. There was some red paint on the bridge. Now, do you know whether there was any orange paint, or orange colored paint on the bridge somewhat to the west of where this Pontiac was when you were there that morning?

A. There may be, yes, there is some sort of orange colored paint on there, all right.

Q. Do you know how long that has been there, the orange colored, as distinct from anything that might have been red?

A. Well, I didn't, as I say, think that there was

(Testimony of Raymond Charles Hoynes.)

any difference. With the red on the white stretched along the bridge, I might call it all red or orange.

Q. Well, the paint that you saw the morning of the accident about at the sixth or seventh post, the sixth post on eastward, was that red or orange?

A. Red on the posts to the east.

Q. And if there was any orange, splotches of paint, on westerly from that——

A. Well, if you call it orange, yes.

Q. Well, I am asking you if there is any orange, do you know?

A. I don't know it is orange paint that is on there, no.

When counsel showed me Exhibit No. 7 as to my recalling, the bridge didn't appear to be that much chewed up, well on that little picture here where they had that slivered off the bridge, that is I say, as it shows in that. It didn't look like there was a big sliver off of that railing. It don't show it there like it does in that little picture, referring to Plaintiffs' Exhibit 7, and what you were getting at, this picture makes it look as bad as it was and maybe a little worse to just look at the picture. The damage is accented. The sleepers on the bridge or the lower bridge timbers is 6 by 12, 6 inches wide and 12 inches deep.

When I was coming back from my assignment that morning at the end of the route to the east, my or something like that off the road, but I would idea is that we may have stopped and thrown a rabbit say we were back there about 9:20. We drove a mile

(Testimony of Raymond Charles Hoynes.)

and a half to the east and came back, and we may have stopped, and when I got there there was somebody else there. There was about, I can't say for sure, but there was about 3 cars, probably 3 vehicles on the east end of the bridge, maybe as many more on the west end, 2 or 3.

I stopped on the east end of the bridge behind those vehicles that were there. I can't describe the vehicles now, but I believe there was a laundry panel outfit there, but I wouldn't know the color of it. I don't recall another vehicle to the left when I stopped near the east end of the bridge, and I don't remember that. As to whether there was a slight, young girl there about 20 years of age with a kerchief over her head, I can't say, I didn't pay enough attention to it. I think I went across the bridge first, or part way across anyway to the Pontiac car, and then turned around and went back and saw this woman in the car and they couldn't get the door open so I went immediately back to our truck to get a bar to pry the door open. I did not see anyone in the Pontiac when I went to it, the people were already out of the Pontiac, at least I didn't see anyone in it. I wouldn't say that they were out, but I didn't see anyone in it. When I got to the Buick, there was a woman slumped over the steering wheel, and she remained in that position. I was there when Mr. Coles, the photographer came, and I think she was still in the same position at that time, and I say that when I went to get the bar, the woman was alive. I could see by her eyes that she

(Testimony of Raymond Charles Hoynes.)

was alive, her eyes were open, but she did not speak to me, she may have moved enough that I could see she was. Well, I didn't see her move, but I see she was alive. She may have moved a little, like I said, but she did not speak or make a sound that I know of.

The narrow bridge signs which appear in picture No. 4 of Plaintiffs' Exhibit 4, that was the only sign close to the bridge, that was the only sign that was there then, that's right. That was the only sign on the 30th of August. There was a sign some miles west, no sign to the east besides the sign that was there. There was no sign immediately to the west of the bridge. From Malta to the bridge going east from Malta to this bridge on the 30th of August, there weren't any narrow bridge sign facing the traffic coming from Malta towards that bridge, not at the bridge. There were signs between Malta and the bridges saying "Narrow Bridges the next 10 miles," and there were no signs to the east with "Narrow Bridges the next 10 miles." This is the first sign that you see coming from the east, but there were signs between Malta and the bridge with the same legend on the south side of the road going east. There was a sign, not signs, with the same legend, "Narrow bridge next 10 miles."

When I stopped after this accident had happened, I made an inspection of the south rail on the bridge. I looked at the north rail and as you show me photograph No. 3 of Plaintiff's Exhibit 4 in this case, the mark of some sort near the post above the right rear bumper of the Pontiac, or the automobile that

(Testimony of Raymond Charles Hoynes.)

I see sitting there, I did not observe that gouge on the north rail of the bridge. Well, I just looked at it, the north side as a whole, but I didn't notice any particular damage that was done to it, not to any extent. I just didn't observe any particular damage there, as far as any damage to any extent, because there was no damage to the bridge that might interfere with other traffic or anything of the sort, and that is what I was looking for—damage to the bridge that might interfere with traffic. And there is nothing on the south rail of the bridge that would interfere with traffic, but I did observe it more closely. I wouldn't say the mark on the north rail of the bridge wasn't there.

Q. And I want to call your attention, do you see any of those paint smudges in this picture, do you see pictures of those paint smudges that you have been telling us about?

A. No. I see a little slivers on top of the bridge there, and like I say, they may have happened from the snow plow or something else. I don't see no paint smudges. [202]

PHILLIP VERT

Direct Examination

My name is Phillip Vert. I work on the highway and I was an employee of the highway department, doing work on the highway in August, 1955. My station was at Malta and we worked east 14 miles, and about 26 miles west. Our duties were generally maintaining the highways—keeping the roads clear and

(Testimony of Phillip Vert.)

one thing and another of any debris that might interfere with traffic—and patching and general repair work. I recall the morning of the last day of August, or I mean the second to the last day of August, August the 30th, 1955, and I was working on the highway that morning. I was working with Mr. Hoynes. We left Malta shortly after eight, and I know this bridge that is over at the easterly end of Bowdoin Lake, and I am familiar with the particular bridge upon which this accident occurred that I have listened to testimony concerning this morning, pretty much so, and as we went out there on that morning, we passed over the bridge, we were going east. We did observe the railings of those bridges along there as we went along. We don't pay too much attention to them if they are not slivered up sometime along that line. If they are not badly slivered, you wouldn't pay too much attention to them.

On the morning in question, as to the condition of the boards or railings along the south side of the bridge there that day, as far as I know, they were pretty much the same condition they had been right along. There was nothing unusual about it. I didn't see any bad splintering or any smudges of paint on at that time. As to how long we were away from the bridge after we passed out east that morning, I would say we drove down to the end of the section, probably 15 or 20 minutes, about a mile and a half from the bridge, and then we got down to the end of our station and returned, and on our way back

(Testimony of Phillip Vert.)

as we came over the hill, we could see cars—see the wreck there where it had happened—there were several cars there by that time, and by the time we came over the hill, there was when we noticed the wreck and the people around there. On the morning in question, generally speaking, as far as I know, there was nothing unusual about the bridge as we went out. I didn't see any bad splintering or any bad smudges of paint on at that time. And after we got down to the end of our section, we returned, and on our way back, we came over the hill and we could see the cars and the wreck where it happened. There was nothing there when we went over. We pulled our car off to the north shoulder, and at the time we pulled over on the north side of the highway there were two or three cars on that side and some on the other end, on the west end of the bridge.

Q. But the cars that you saw there as you came up there after going down to the end of your station and back, were they all on one side, or all on the northerly side, if you remember?

A. No, I believe there was one on the south. I couldn't swear to it, but I believe there was one on the south side. [217]

I didn't pay much attention to what it was and I didn't recognize any of the vehicles as I came up there that morning. As we came back to this place, we did not take a look at the bridge at once, because I was too much interested in taking care of traffic and one thing and another. I didn't pay too much attention to the bridge at that time. I saw a car off

(Testimony of Phillip Vert.)

of the road as I came up, the Buick, I went down to the Buick and as I came down to the Buick, I went down to see if there was anybody still left in it, and I seen this woman was still in it. The woman was seated under the wheel and she was sitting up. She seemed to move just a little as I went down to the car. She was pretty much hunched over the wheel. I didn't speak to her, I felt her pulse and I couldn't feel it. Then I walked back up to where the children were. They were laid out on the shoulder of the road, and I did not see the woman change her position while I was there. She remained in the same position. Then I went through the bridge to the other end, and there was a man and a woman laid out there. As I went by the Pontiac car, I didn't look in to see if there were any people in there. The children that were laid upon the shoulder of the road were brought in town with a station wagon. It was a station wagon of some kind, but I don't know who the operator was.

After the accident, I noticed paint scrapings on the bridge. There was paint pretty much in the middle of the bridge where the accident happened, and it was red paint, and the color of the Buick was red.

Cross-Examination

Yes, I think the children went into Malta in a station wagon. I was there when that station wagon went across the bridge. The station wagon went through. As to whether or not the station wagon was

(Testimony of Phillip Vert.)

the laundry panel delivery truck, I could not say. There was a laundry panel truck there, but they were in that or a station wagon, I couldn't say. The color of the station wagon was something of a purple color. I believe something along that line, and the laundry panel was purple and there was also a station wagon there, and I don't just remember what the color was, it seems to me that it was a light color, that is about all I remember about it. The vehicle that was parked off to the south, or on the south side of the road on the east side of the bridge, I didn't pay any attention to it. I don't know whether it was green or what it was, and when I went down to the Buick, the door was jammed. The left hand door was jammed. There was nobody on that side of it when I went down there, on the left hand side of it. There was somebody on the other side of the Buick, but I just don't remember who it was, and that was at the same time that I went down to the Buick. The movement that I saw on the part of the woman was just a (demonstrating) it could have been, it looked very much like it. The car was not being touched or moved by other people around there. There was nobody trying to get in the right door. There was somebody on the other side that said something about that being jammed, but I didn't pay much attention to it, and that was at the time that the woman moved.

CHARLES McCHESNEY

My name is Charles McChesney and I live at Saco, Montana, and I follow the occupation of ranching. I have one ranch 12 miles northeast of Saco, I call it, and one is 55 miles southwest of Malta. I have been engaged in ranching operations almost 40 years in this vicinity, and I homesteaded near Saco, and I have been active there ever since. My work requires that I drive back and forth between the two ranchs occasionally, and I did have occasion to drive or start a trip from my home in Saco to the ranch south of Malta on the 30th of August, 1955. I traveled over Highway No. 2 to Malta. As I was traveling towards Malta, I came upon an accident and this accident was at a narrow bridge on No. 2 highway north and a little east of Bowdoin Lake, between Malta and Saco.

When I arrived there, there were 2 or 3 other automobiles ahead of me. I think I was even the third or fourth car there. I came from Saco towards Malta towards the east end of the bridge and I imagine that I must have been close to a hundred feet from the east end of the bridge behind either 2 or 3 other cars. We were held up there, but when we crossed the bridge later, we drove on the south side of the highway going west. With relation to the bridge, I stopped in the line of traffic back of the bridge, and it would be east of the bridge and about a hundred feet from the bridge, I would say.

As I arrived there, I got out of the car and walked over to the first car and noticed Mr. O'Keefe's chil-

(Testimony of Charles McChesney.)

dren lying on the bank under a blanket, and I think he was lying alongside of them at the time. The car that I noticed was a red Buick, and it was just east of the bridge with the front end of it hanging over the embankment into the barrow pit. I observed the other car that had figured in the accident, or been involved in the accident, and it was a Pontiac car. The Pontiac car, as I came up there, was setting across the center line, possibly the front end of it, I would say, a little more than three feet across the center line of the marking on the bridge, facing to the southwest. The Pontiac was across the center line to the south facing in the southwesterly direction, and there was not room, when I first came up there, there was not room to pass between the south railing of the bridge and the Pontiac automobile because the Pontiac was too far over the center line facing to the southwest and there was not room enough for another car to pass it. While I was there there was some change made in the position of the Pontiac automobile. Four or five men got a hold of the front end of the Pontiac and skidded it over so that traffic could go by, and after that was done the traffic got by through there while I was still there. I didn't remain there. I think I took my turn going across the bridge after the Pontiac had been moved.

Looking at Plaintiff's Exhibit No. 4, picture No. 3, I look at it and that appears to be one of the vehicles involved in the collision. It is the Pontiac. I observe a portion of an automobile lying to the

(Testimony of Charles McChesney.)

left of the front portion of that car in the roadway there. I was there when that portion of the automobile was placed there. It was placed there so that they could take a picture of the vehicle. I observe picture No. 2 of Plaintiff's Exhibit 4 and I recognize the other vehicle involved in that accident. It is the Buick automobile that was involved in the accident and it is in the position approximately it was when I came up there.

Cross-Examination

Mr. Doepker called my attention to a portion of the vehicle which appears to the south of the Pontiac in picture No. 3 of Plaintiff's Exhibit 4. When I first came up to the accident, as near as I can recall, that portion of the automobile was lying over here, and it was taken out for the ambulance, not the ambulance but the panel job from Glasgow to take Mr. O'Keefe's children to the hospital, and then it was put back there for the photographer to take the picture. As near as I can remember, the part of the automobile was lying right close to the railing, right close to the bridge railing, about opposite where it shows in picture No. 3. I wouldn't say positively as to that because those are some of the minor details that a fellow wouldn't pay particular attention to, but I remember very distinctly that being moved. I don't remember who moved it. I remember one man who helped move the car, but I did not participate in the moving operations. But I observed them, the moving operations. I think there were 3 or 4

(Testimony of Charles McChesney.)

men and I think they didn't lift the front end of the Pontiac, they just skidded it over. Got down low with main strength. I suppose you would call it that. There were four men, four or five men, I don't recall just how many but there was one man on the job that I knew. As to whether they took hold of the bumper or, well, no, there was no bumper there. The bumper was pretty badly bent up. They took a hold of most anywhere they could get a hold of the vehicle, and I didn't observe whether some parts would bend or give. I didn't observe that. When they moved the vehicle, I was on the east side of the bridge, probably standing alongside of my car. It would be about a hundred feet from the place where the vehicle was located so that I couldn't see the front of the Pontiac when that moving operation was going on, but I am sure that the Pontiac was about three feet over the center line, but I did not measure from the center line, that is an estimation on my part. Of course, there is actually no center line on the bridge. I was estimating by eye the approximate distance. I think that the bridge is approximately 20 feet wide. I am sure it is quite narrow. It is more narrow than the paved portion of the highway in that vicinity. The pavement narrows down to that bridge. As I said, when I first came up there there were, I just recall how many, I know there was just a very few cars there, I was either the third or fourth car there, I am sure of that, and one of those ahead of me was a laundry

(Testimony of Charles McChesney.)

panel. I couldn't identify it, that is, I couldn't identify who it belonged to.

Q. When you were there by the children lying on the highway, did you observe a young girl there, a relatively young girl, about 20 years of age?

A. I observed somebody that somebody reported was a nurse.

Q. Actually there were two girls there, were there not, women?

A. Well, there was quite a lot of folks there, you know, before it was over with.

Q. No, I mean when you first got there. [261]

A. No, there were very few people there when I first got there.

Q. Were there two ladies there at that time?

A. I don't recall whether there was two or not. I know that panel truck was there.

Q. Do you know whether there was a green Ford station wagon?

A. No, I don't know whether there was or not. I don't recall that.

Q. Did you notice any vehicle parked on the south side or shoulder of the highway to the east of the bridge?

A. No, I don't recall that either.

Q. You don't recall it? A. No.

Q. You don't know whether it was there or not?

A. No, I don't recall it. [262]

This laundry panel went through after the Pontiac was moved. It had to be moved before the laundry panel went through. I am only speaking of the panel laundry truck. The Pontiac had been moved

(Testimony of Charles McChesney.)

before it went through, and the piece of the automobile that I referred to also had been moved, but I saw the piece of the automobile put back for the purpose of taking a picture, but I don't recall who put it back. There were a lot of strangers there, mostly all the traffic on that road is tourists.

GENE SEEL

Direct Examination

My name is Gene Seel. I reside in Malta, Montana, and I have lived there about 15 years. I was residing in Malta on the 30th of August, 1955, and at that time I was employed and worked for the Chevrolet Garage in Malta and it is known as the Malta Standard Garage. In my capacity of working for that garage as a part of my employment I drive a wrecker and I was called to the scene of an accident on that morning. I went out about 12 miles or so east of Malta to reach the scene of the accident, and when I arrived there, well, there was quite a line of cars on both sides of this bridge and they were tied up there because this Pontiac was setting on the bridge and the Buick was sitting in the barrow pit on the east side of the bridge. I have some memory of the position of the Pontiac on the bridge at that time, and to the best of my memory, the Pontiac was sitting cross-ways on the bridge facing southwest. There was just barely clearance for a car to get through between the Pontiac and the south rail-

(Testimony of Gene Seel.)

ing of the bridge, and when I speak of the south railing of the bridge, I mean the main railing.

Well, we had to move the Pontiac before I could get through, but I understand that the ambulance did get through there. When I arrived there there wasn't any of the injured laying around. Whoever had been hurt in the accident had been removed. I met them on the way to town. I met them as they were going to the hospital.

Observing picture No. 11 of Plaintiff's Exhibit 4, looking at it, it is my wrecker that is shown in that picture. The vehicle that has the diagonal stripes on it, that is set in a position directly in front of the Pontiac. At the time I was engaged in moving or getting ready to move the Pontiac off the bridge so the traffic could get through, there were several trucks and large outfits there that had to wait for the Pontiac to be moved. In moving the Pontiac, we hooked a cable on to the under carriage in the front of the car and slid it sideways until we could pick the front end of the car up. In sliding the Pontiac sideways, we slid the front end of it to the north, and after we slid the front end to the north, we got a chain to the under carriage on the front and towed the car to the barrow pit on the south side of the road and left it there. In our operation in lifting and taking the Pontiac off the bridge, it may have left cable marks or something like that on it, but it wouldn't damage it in any appreciable amount, and it would not dislodge the bumper or any part of the front end of it, and I am sure that

(Testimony of Gene Seel.)

that was not done in our operations. After we hooked on to the Pontiac in the manner that I have indicated and lifted it up, the front end, I put the Pontiac down through the barrow pit and left it sitting there, turned around and drove across the bridge until I was behind the Buick.

In picture No. 8 in Plaintiff's Exhibit 4, I recognize that roadway there and I see the Pontiac after it was pulled through the bridge. The Pontiac is sitting on the south side. This would be the south side on the south side of the road. This picture is looking east and we pulled the Pontiac off the bridge down through the barrow pit, down to the south side of the road here, and that is the Pontiac sitting there, and the Pontiac is indicated to the right of the picture here. That is the manner that we carried it through the barrow pit and then up on the shoulder on the other side of the barrow pit and pulling the Pontiac that time, we pulled with the same cable that we used to lift it. It was very easy to move after we lifted it. We did not damage the Pontiac in any manner in moving it there, or change the front end of it. After we left the Pontiac in the position that I have indicated, we went back to the Buick.

Looking at Plaintiff's Exhibit 14, Exhibit 4, that is the Pontiac after we moved it off the road. Looking at Plaintiffs' Exhibit 14, Exhibit 4, the chain shown in the picture, I imagine it is ours, I don't know for sure, but I imagine that it is. The cable runs around the front cross member behind the wheel. That is a chain with a ring in the center and

(Testimony of Gene Seel.)

hooks on both ends and one is hooked on the left side of the car, and one is hooked on the right side of the car. When I observed the Pontiac and the bumper and the position it is in in the picture and that condition that appears in the picture, I would say that is the way it looked on the bridge. After we got the Pontiac in position that it was, I pulled over behind it, stopped and got out, and Mr. Bell asked me if I would help him move the body. Then we went over there on the east side of the bridge. We left the west side and went over to the east side and by that time the bridge was clear of vehicles. We went over there and found the Buick on the east end, nose down, into the barrow pit. It was down in the barrow pit and at the time, someone was working around the Buick car. I had been over to the Buick before, when I first got there and they were waiting to get—when I first got there Mr Bell asked me to help him get the body out and we couldn't move it—couldn't get it loose. We couldn't get the body of the deceased woman out of the Buick. Her legs were pinned in under someway under the dash. The dash had been pushed down on to her legs and it was impossible to dislodge her in the position the car was, so we tied on to the back of the car so that it would stay stationary while they lifted the cowl portion of the car off of her legs.

Looking at picture No. 2 of Plaintiff's Exhibit 4, the tail end of our vehicle is on the highway, and that is the tail end here shown at the right of the picture. There is a man apparently hanging on to some kind of a cable, standing over across the bar-

(Testimony of Gene Seel.)

row pit, and there is a gentleman apparently in a light colored shirt. I had a hold of the end of the cable there getting ready to fasten it in the car and this is a picture of me here. I am looking away from the photograph, however, and I have a hold of the cable there.

With respect to fastening on to the Buick, we fastened the cable, that is—well—the cowl and body is shaped a lot different. The windshield is a wrap around type windshield, and the windshield was out and, of course, this door was open by then and we ran a cable around this pillar, curving pillar that comes down. We wrapped the cable around there and, of course, he was up above it enough so that when he tightened on it, it didn't take too much strain and it lifted that section of the car up and we fastened the cable around the post that is comparative to the panel, the post of the Buick. Then we ran this wrecker up further and hooked on to this back bumper and just set it there stationary, then he tightened this cable until it lifted enough on there to lift the dash. It only lifted it, I imagine a couple inches until we could free her legs. I used my wrecker as an anchor to hold the Buick on the rear end and fastened it to the rear bumper and I also fastened the cable around the cowl of the post. Mr. Long was running the other wrecker and he tightened the cable necessary amount to lift it, and after the cable was tightened to that extent, we were able to remove the body of the deceased woman. In

(Testimony of Gene Seel.)

this operation, I don't think that there were any parts broken or any parts changed of the Buick. I don't think you would be able to see any change at all because when they took the slack in the cable, the car settled back almost in the position the dash had been in before. After the body was removed, I pulled the Buick out of the barrow pit.

Looking at picture No. 9 of the Plaintiffs' Exhibit 4 at the time the picture was taken, I don't know if we were moving or not but it looks like we have already hooked on to the Buick and getting ready to take it out of the barrow pit. In order to remove the Buick from the barrow pit, we hooked on to the front end and pulled the car out to the east. I don't remember how far, but to a spot where you could get back on the highway with it. We hooked onto the under carriage on the front end here and picture No. 1 shows the Buick down in the barrow pit, and the cable that I talk about was fastened right around this windshield pillar.

After the body was removed, we got our car in a position to pull it out—pull the Buick out and fastened it onto my wrecker.

Looking at picture No. 15 it is still attached to my wrecker in that picture. During the operation and carrying it from out to the scene of the accident to the place where this picture was taken, as to doing any damage to the vehicle or changing the front end or the damaged side in anyway, well, it may have settled a little, the bumper may have raised a little from the weight of the car, but it would be very

(Testimony of Gene Seel.)

little, you wouldn't notice the difference I don't believe in the picture and you wouldn't notice the difference on the car after you got through moving it. We did not in anyway pull or distort the front end of the Buick in our operations. In this picture it is brought to our garage there in Malta. After that date, it was placed or stored, well, we have two buildings joined together, one, we use for most of our garage work, the other for storage and it was put in the old building. It was backed into the garage with the wrecker and then it was moved over onto the spot where we stored it with a floor jack and in that operation we did not distort or change the Buick in any way.

I was around there until the time the Buick was moved. I was there all the time. There was no work done on the Buick of any kind. It was put in the stall and left there and the car was finally sold to the Buick garage in Malta. As far as any of these photographs that we show are concerned, the car was in the same condition that it was out there by the bridge. It is in the same condition.

Looking at Plaintiffs' Exhibit No. 11, that is the Buick sitting in the garage. That is the position in which it was placed, and as to the side of this Buick with the markings that appear to be on it, to the best of my knowledge, those markings are white paint markings and scraped metal. I mean the paint was scraped off down to the metal. That is on the right hand side of the Buick car and this is the Buick that was involved in this accident. The pho-

(Testimony of Gene Seel.)

tograph correctly shows it as it stands there in that position.

With respect to Exhibit No. 12, I recognize the photograph from a different angle. It is the same car and the same place, and it is the same side of the car. With respect to the markings, scrapings and paintings, it is the same thing. That is the condition in which it was brought in. There was no scrapings or markings put on there in our operation.

Looking at Exhibit No. 13, that again is the right side of the Buick sitting in the same place. The photograph is taken in different angles and it shows correctly the side of the Buick as it set in the garage there and those markings were on there when I went out to pick it up out of the barrow pit and it hasn't been changed in any way as it was in the barrow pit as far as those markings are concerned.

Plaintiffs' Exhibit 14 is a closer close-up picture of the Buick car. It is a section of a right front fender and a right front door and I recognize the markings that appear upon there. There are scrape marks, I guess you would call them. They are white in color. Those were there when I picked the car out of the barrow pit and was not added to or detracted from afterwards.

As to No. 15 of Plaintiffs' Exhibit, that is the left rear or the right rear section of the rear fender on the same car and the markings appearing on that I recognize, there are the same markings that are on there. There are markings with white paint

(Testimony of Gene Seel.)

and bare metal and they were on the Buick when I went down in the barrow pit and got the car out of there. They have not been added to, detracted from or changed in any manner and the picture was taken in the garage.

The Plaintiffs' Exhibit 16 is the right side of the front section of the front door and a section of the rear door and I recognize the markings that appear on the automobile on the right side there. They are skinned spots on the right side that again show white paint and scraped bare metal, and those markings were on the Buick when I went down to pick it out of the barrow pit. There has been nothing added to it or changed in any particular while it was here in the garage. I don't remember exactly when this car was moved from the standpoint of the Standard Garage but it had been there a good number of months and I worked around it every day and saw it during that period of time. Some of the pictures that were shown to me showing the right side of the Buick car show the car with something under the left side to make it sit up in the proper position. I believe it was a cement block under the front end. You see, we had to set something under there to be able to get out our jacks from under it after we put it in position. For example Exhibit No. 11, I believe, almost just off of the center under the front end there was, I believe, it is a 8-inch pumice block set under the member to hold the car up there until we got our jack out.

(Testimony of Gene Seel.)

Looking at a stereo three dimension slide, a colored photograph of the front of the Buick automobile which has been marked Plaintiffs' Exhibit 9, upon examining it and looking at it, I recognize it, yes, that is the front end of that same Buick sitting in front of our garage down there. The photograph was taken the same day the accident happened and it correctly depicts the front end of the Buick in color as it existed at the time it was down in the barrow pit, and it was brought in in that position into the garage. Of course, the Buick being held up by the chain of the wrecker will change it from the precise situation that the Buick was in right after the accident, it is possible, you know the car didn't set level without something holding it up. The picture shows the left hand side high and the right hand side low. I believe without the chains or anything, it would probably be just the bumper and stuff would be almost on the ground on the left hand side.

Looking at Plaintiffs' Exhibit No. 10 which is a stereoscope slide it shows the front end and left side of the Buick and it stands in the same spot in front of the garage and with respect to its being in the same condition as it was when it was out there at the scene of the wreck it is in the same condition with no changes.

(Testimony of Gene Seel.)

Cross-Examination of Mr. Seel

As to whether or not I examined the inside of the Buick automobile while it was in the barrow pit out east, I was in it but I never examined it. I saw some articles of clothing and beer bottles, I don't recall what all was in there. I don't remember seeing a case of beer bottles, there were several empty bottles on the floor. I don't recall seeing a case though. I looked in the trunk and there was a case in there but it wasn't a case of beer, it was a case of bottles, or a part of a case of bottles. I never seen any full bottles. I never went throught it, there may have been. I believe there was only one case of empty beer bottles in the trunk.

Looking at Exhibit No. 14 of Plaintiffs' Exhibit 4, I looked at the picture a few minutes ago and I note that there are chains tied around the front bumper. There is one chain around the back bumper or the front bumper back bars, the attaching bars, and there is also the other end of the chain is fastened around the front cross-member. Looking at the manner in which the chains are fastened or wrapped around as shown at the left-hand side of the picture and that it follows across the front of the automobile as shown in the photograph and it appears near the left front wheel of the automobile, and that is one chain going around and the hook goes back and it's hooked in this side, the chain goes around through the bumper

(Testimony of Gene Seel.)

over the back bars and comes out and is hooked here (indicating). As to whether it caused the bumper or any part of the front part of the Pontiac to move, putting that chain on it it may have raised the—I don't know which side it would be, the right side, the right side of the car, these back bars, but it is hooked far enough back that it raised it very slightly. This chain is hooked around the main cross-member on the front of the car and that wouldn't change the front of the car at all. Looking at the same photograph, condition of the tire on the left front wheel of the Pontiac, it was flat. As to whether it was actually torn, I don't remember how it was. I know there was no air in it. As to the rim, I don't recall whether or not the rim was bent. In any event, I feel that the front of the bumper appears the same in the later pictures as it appeared in photograph 5 of Plaintiffs' Exhibit 4, as to the Pontiac. While it is a different angle, it looks like it would be the same to me. It appears the same to me, yes, and I don't think that moving the Pontiac from that position over to the barrow pit up to the position it is located in in photograph 14 would have changed anything at all. The Pontiac was moved, well, so I couldn't get through and there was, I know, I don't know how many, there was quite a line of traffic waiting to get through and as soon as they had the pictures and it was clear, why we moved it so that I could get through and so the rest of the trucks could get through. An ordinary passen-

(Testimony of Gene Seel.)

ger car could squeeze through. An ordinary passenger car could go through but a truck couldn't get through until the Pontiac was moved.

Looking at photograph No. 3 of Plaintiffs' Exhibit 4, I notice the brig or crease in the top of the Pontiac about the mid-section that I don't recall seeing it before, no. I didn't have occasion to look at the frame of the Pontiac directly below or approximately below that crease or brig. I don't know whether the frame of the Pontiac was broken, I have no idea and I don't know whether it was bent at that point, or what point it might have been bent, I don't know, I never looked under the Pontiac.

WAYNE LONG

Direct Examination

My name is Wayne Long. I am employed by the Malta Motor Company in the capacity of manager, service manager, manager of the service department. In the course of my work during the past couple of years, on occasion, I drive a wrecker for the company. On the 30th of August, 1955, on that day my firm was called to a wreck that occurred on the highway. It occurred approximately 14 miles northeast of Malta on Highway No. 2, and with reference to the bridge that was there, it was near a bridge and I am familiar with the bridge at the easterly end of Bowdoin Lake and that's the bridge in question. After we received the call on that day,

(Testimony of Wayne Long.)

well, when I arrived at the scene the traffic was quite heavy on each side. I was flagged through the bridge and instructed to go up into a field and circle back on the north side of the Buick. So by the time that I got there, there was a place for you to go through to get to the Buick. I went through a field further east and came back to near the Buick. I was instructed to back in as close as I could up to the fence, north of the Buick, so that I could run a cable out and attach it to the Buick in order to release the strain that was causing the victim to be pinned in the car.

Observing picture No. 12 of Plaintiffs' Exhibit 4, my outfit appears in that picture and it's at the extreme left-hand side of the picture on the north side of the highway, so that looking over one of the rails on the north side of the bridge, you see the end of my wrecker and there is a cable dangling down off of a pulley and that is the cable which I refer to. I received assistance by someone at the end of the cable. I was required to stay in the wrecker and operate the winch and someone brought the end of the cable back to the Buick and I attached it. The opposite end of the cable was attached by some other person.

Looking at picture No. 2 of Plaintiffs' Exhibit 4, I recognize it to the extent that I still in the wrecker operating the cable and I believe that Mr. Seel is near the left front side of the Buick. I don't recognize the gentleman in the picture that is hanging on to the cable. In order to tighten

(Testimony of Wayne Long.)

up that cable, there is a power winch that is directly attached and applied by transmitted power from the motor and it has to be operated from inside the cab. I had to direct the pull on the cable from the cab. I was operating the cable by having signals given to me and as soon as I had pulled near enough so that it would release, and the idea was that as soon as I had pulled near enough so that it would release the victim in the car then I would stop the cable and hold it steady. After that day I had occasion to do something with the Pontiac car. After the cable was released from the Buick, I went through two gates back onto the highway east of the bridge, came back and crossed the bridge and went down into the barrow pit over on the south side of the road where the Pontiac had been placed and I picked it up with a wrecker and removed it from the scene, and in that operation this Pontiac car, I found the front end of it was in such condition that you could hook onto it, and I hooked onto it and lifted it up and brought it to the Malta Motor Company in Malta. In that operation there were no changes or alterations whatever made in the car in any way and the operation did not tear the front end loose or change it in any manner. After it was delivered to the garage, we placed it in the yard back of the garage. We have a lot where you can store automobiles and that lot is locked and kept in condition by our people. I saw the Pontiac most every day that it was in the garage there and

(Testimony of Wayne Long.)

there were no changes made in any particular during that period. What happened to it after it had been in our lot for awhile, I believe, to my knowledge, it was disposed of and picked up by the Pontiac Garage. The Pontiac Garage is about a block south from the yard where the car was stored. After the car was taken to the Pontiac Garage, that's the last I know about it.

Looking at a stereoscopic three dimension slide through the viewers I recognize the Pontiac and the picture is the left-hand front corner of the Pontiac. I remember when I picked it up at the scene of the accident and I do remember that left end as it was picked up out at the scene quite well. I would say that the Pontiac is the same as it was when I picked it up out at the barrow pit, and it correctly shows that portion of the Pontiac.

Cross-Examination

When I was out at the scene working about the Buick, I didn't look in the back seat of the Buick or in the trunk and I don't know what may have been in it. I would say that I got out there approximately about an hour after the accident so that the injured persons had all been moved by the time that I got there. I believe the highway patrolman was directing the operations, or he was the man that flagged me through the bridge and instructed me where to go. The highway patrolman

(Testimony of Wayne Long.)

was directing the operations while I was there, mostly.

Looking at picture No. 3 of Plaintiffs' Exhibit 4, the Pontiac was not in the position shown in that Exhibit when I got there, but I do notice the crease towards the middle of the top of the Pontiac and I see and observe the crease. As to whether I observed that in the Pontiac when I got out there, I would say not right at the scene. I observed it later after a closer examination of the car. After I made a closer examination, after we got to town, I looked at the under carriage and we examined it pretty well.

Describing the frame, well, the frame on the left-hand front corner of the unit was very badly damaged and driven back considerably towards the cowl of the unit. I don't believe the frame was broken, it was just badly damaged and bent. It was bent approximately below the place where the crease appears in the top. The whole side rail was buckled and damaged very badly in this whole area of the automobile. You see, it took the jolt here and damaged the frame back in here (indicating) causing the body to buckle.

Looking at picture No. 4 of Plaintiffs' Exhibit 4 which is taken at an angle which shows the right-hand side of the Pontiac, the buckling in the frame, which I found under the crease, which we had in the picture which I just looked at, would—as to whether it would tend to turn the whole right front fender of the Pontiac towards the east in this pic-

(Testimony of Wayne Long.)

ture, I believe the picture gives a false impression there. I don't believe that this fender was much out of line with the body in general because this door is open. If I remember right, this was pretty much in line on the left-hand side or on the right-hand side. However, on the left-hand corner it was driven back and buckled in next to the body. I don't understand that the whole right side of the Pontiac was intact and in a straight line, it was buckled down more than it was sideways though—buckled down more than sideways.

STANLEY JAMES HOULD

Direct Examination

My name is Stanley James Hould and my occupation is that of a grain farmer in the summer time and I work as a carpenter during the winter. In the fall of 1955, I was residing in Malta, and that was subsequent to August, 1955. I had occasion to make some measurements in connection with the bridge 12 miles east of Malta at the request of the counsel for the plaintiffs in the case. I am familiar with the use of a steel tape and measurements and so on and the work.

Q. Did you have occasion to measure the width of the Buick car, for instance?

A. I obtained the width from the Malta Auto Company, which they received, they got out of the Buick Facts Books of the Buick Motor Division, and it was typed up for me and signed by Lee

(Testimony of Stanley James Hould.)

Robinson here, to the length and width of the Buick car.

Q. Okay. Are you familiar with the Buick car of the same type, same kind of a car as the one that was involved in the wreck? A. Yes.

Q. Have you checked those measurements?

A. I did not check them, I took these measurements from the Buick Fact Book. They said it was the over-all length——

Mr. Alexander: Just a moment. We object to what they told you about the Buick Fact Book.

The Court: Sustained. [312]

I took some measurements of the bridge in question, and from those measurements I prepared a sketch of the bridge.

Plaintiffs' Exhibit No. 34 for the purpose of identification, was the sketch that I prepared. I obtained the facts from which it was prepared. I went out and measured the bridge with a steel tape, took all the figures down and scaled it out to a quarter of an inch per foot. It isn't exact, I'm not an architect. I mean to the nearest fraction of an inch. I mean it is very close. For the purpose of illustration, it would correctly depict, for instance, the distance between the poles or railings on the side of the bridge and the upper posts, and the distance those posts are apart. I correctly measured the bridge from the extreme easterly end to the extreme westerly end for the length of the bridge, and I correctly measured the width of the bridge to the railing and to the sleeper that lays along on each side of the road as you go along there,

(Testimony of Stanley James Hould.)

and those measurements were made correctly. After making those measurements, I sketched them in on the Exhibit so that they came to a point where one quarter of an inch or one quarter of an inch here is one foot on the ground—one quarter of an inch is one foot on the ground. The top of the map is toward the north and to the right is east.

(Witness then marks the directions on the sketch.)

Generally speaking these are the general directions of the ground. In measuring the measurements of the bridge, we stretched a tape, we had a hundred foot tape, we stretched it across the bridge right at the very tip of the sleeper at the east end of the bridge and we went the complete distance of the bridge, and in measuring that bridge with a steel tape, in the manner that I have indicated, I find that the overall length of the bridge was 96 feet $\frac{1}{8}$ of the inch. Then I measured the west end of the bridge for the width, and at the west end from the outside of the sleeper on one side to the outside of the other side is twenty feet 3 inches. Taking one of the photographs to identify the point I made the measurements, I look at Plaintiffs' Exhibit 3 which will illustrate the bridge and the timbers at the base of the highway, and those are the ones that we call sleepers or timbers at the base of the highway. In making the measurements for width, I went from the base of the tenth timber shown in Exhibit 3, that is at the base, to the timber base on the other side

(Testimony of Stanley James Hould.)

or north side, and in that measurement, the inside measurement between the base of the sleepers was 19 feet 2 and $\frac{7}{8}$ inches on the west end of the bridge. From the outside of this sleeper log, on one side to the outside of the log on the other side, the measurement is 20 feet 3 inches, and that sleeper is entirely inside of the posts that are indicated with a little square cross through them. That measurement would be only to the inside of the post, or to the inside of the post on the opposite post across the road, and the distance between the posts varied a little, they varied from 6 feet $1\frac{1}{2}$ inch to 6 feet 5 inches, but I didn't indicate those variations on the diagram I made, but I set them in a position so that they could be measured and determined by using a scale of one-quarter inch equals one foot.

By using a scale of one-quarter inch equals one foot and taking two or three of the posts and measuring back, it figures out almost the same. They will average the same as I have them here. I found sixteen posts on the north and sixteen posts on the south side of the bridge. I made a record of a particular thing that appeared on the bridge as far as the posts or railings are concerned. Twenty-four feet and eight inches from the west end of the bridge, we found a scrape with paint and white paint scraped off a piece two feet and ten inches long. Then the distance between this first scrape and the second scrape was

(Testimony of Stanley James Hould.)

fourteen feet and one inch, and from the second scrape to the third scrape, it was nineteen feet six inches, and that large scrape was five feet eight inches long and about one inch of this three by eight was completely chipped off the top at that point. About three feet if it was completely chipped off of it, and that is thirty-eight feet from the east end of the bridge and to the last indication of it going east would be thirty-two feet eight inches. As to the east end of the bridge and at the south side of the bridge, the uprights and wooden railings that run along. I went from the east end of the bridge on the south side to find the scrapings and gouging that was where the chipping out occurred. The one on the east of the bridge started thirty-eight feet from the east end of the bridge. (Witness marks Exhibit 34 to indicate the distance from the east end of the bridge.) I put an arrow running a line up a little bit, now this arrow, I will write the letter "A" right down close. I have placed a small letter "A" and an arrow on the south side of this sketch, and that was the beginning of this five foot eight inch scrape, and the part that was chipped off the top of this three by eight, starting seven posts, that would then be the thirty-eight feet from the east end of the bridge to the seventh post.

Looking at Plaintiffs' Exhibit No. 7, I recognize the photograph and with reference to the east end of the bridge, the post where the scrape started was right in here. (Indicating.) That would be off

(Testimony of Stanley James Hould.)

to the right edge of the picture, wouldn't it? Yes. This post No. 6, this is 6 here, but this is 7 where the scrape started, and if we take Plaintiffs' Exhibits 6 and 7, we can observe the starting of this gouged out point. The total scraping at this point was a 5 foot 8 inch piece, starting at the 7th post. Looking at Plaintiffs' Exhibit 6, the scraping started at post No. 7 which would be indicated by counting two, three, four, five, six, seven. From the east end of the bridge it was 38 feet, and the scraping extended up to 32 feet 8 inches from the east end of the bridge. I could not see any scrapings easterly beyond that point. There was also a 3 by 8, the bottom plank, that was completely split. It was split down the center. I refer to the split in the post between Nos. 4 and 5. There were paint markings along the bridge and they were red in color.

(Thereupon, Court adjourned until 10 o'clock, a.m. the following day, October 27, 1956, at which time the following proceedings were had:)

Mr. Angland: Your Honor will recall that yesterday afternoon I stated we had a witness we wanted to call out of order this morning?

The Court: Yes.

Mr. Angland: I wonder if we could call that witness.

The Court: Well, couldn't we wait until we finish with this witness?

Mr. Angland: If we were going to finish. I thought

(Testimony of Stanley James Hould.)

the way Mr. Doepker started with this witness it was going to take quite awhile.

The Court: Do you have much more to go with this witness?

Mr. Doepker: I don't think we have too much more as far as he is concerned, except maybe putting some markings, measurements on that exhibit there, the sketch, your Honor.

The Court: Well, I think let's proceed and get this witness through. [324]

In making the measurements on the south side of the railing of the bridge with regard to splintering conditions and with regard to smears of paint or markings, I made measurements to show where they were located, and taking a rule and my notes, I tell you that what is disclosed on the easterly end of the bridge from the first marking that is indicated with an arrow "A" in marking this sketch, I put an arrow on the sketch.

Q. When did you make these measurements, Mr. Hould? A. October 31, 1956.

Q. Now, will you proceed, please, and indicate and describe the markings on the bridge there on the south side?

Mr. Angland: Now, just a minute, we object to that, because from the testimony of the witness that he has just given, it is impossible for him to have made measurements. He said he made them October 31, 1956, and that date hasn't yet arrived, your Honor.

The Court: Well, what date did you make the measurements? A. September 31st. [326]

(Testimony of Stanley James Hould.)

To indicate the position of the last marking on the bridge, and I marked that last marking with the letter "B."

Cross-Examination

My measurements of the width of the bridge were made at the west end, and I measured the east end as well, and the bridge is about the same width. It is about an inch difference. An inch narrower. At the west end the width was 19 feet 3 inches and the east 19 feet 3 and $\frac{3}{4}$ inches. I made no measurements on the north side of the bridge.

The Court: You suggest you have a witness—who is the witness?

Mr. Angland: Mr. West.

The Court: Why do you want to put him on out of order?

Mr. Angland: Your Honor, he had a man work a double shift for him. He does have to get back quite a distance from here by midnight tonight for a job. We kept him up practically all night last night to get here.

The Court: Well, very well, I'll permit you to put him on.

Mr. Angland: I might say he worked the night before last night, your Honor. [330]

PAT WEST

Direct Testimony

My name is Pat West. I am 32 years old and I have a family consisting of a wife and four children, and I reside at the present time, at Outlook, Montana. I am a driller for the Noble Drilling Company.

In August, 1955, I was working for the Monarch Lumber Company in Saco. Previous to that time, I was with the Monarch Lumber Company in Sunburst, Montana. I have had four years in the Army Paratroops, and I was in the military service between 1942 and 1946. I have had training in first aid. I was a volunteer ambulance driver for three years at Sunburst. My military training along that line, paratroops, were pretty much their own doctors when behind the lines. We had very strict courses in first aid.

I have driven automobiles since I was about 14 years old, I guess, and from my experience in driving, I am able to estimate speeds of vehicles, I believe, pretty close. I have driven quite a little bit on the highways, oh, on many trips, about two trips a year from Sunburst up to Outlook where my family is. That happens a couple times a year. And fishing every week end. My experience has been mostly in Montana. In August, 1955, I was with the Monarch Lumber Company in Saco. I recall seeing an accident about that time. The precise day of the accident, the 31st of August, the 30th day of August, it

(Testimony of Pat West.)

was, and on that day I was going to Malta from Saco. I started that morning about 9 or 9:30, I guess, and the accident happened on a bridge about 12 miles out of Malta, in a easterly direction so that it was between Saco and Malta. Driving from Saco to the place of the accident, I was driving between 60 and 65 miles per hour, I imagine, and before I got to that bridge 12 miles east of Malta, I saw a vehicle ahead of me. The first distance was a mile and a half to two miles and it was four or five miles before he hit the bridge.

Q. Were you—did you ever come up upon that vehicle more closely?

A. Yes, just before coming to the bridge.

Q. And just tell us what you saw when you—just before coming to the bridge, or what you did?

A. I was going to pass the Pontiac car that was in front of me.

Q. It was a Pontiac in front of you?

A. Yes. And being over the road before, I remembered that bridge just ahead, and I pulled in behind.

Q. And at that time, would you be able to judge the speed of the Pontiac?

A. I was still maintaining my speed—I would imagine 45.

Q. And they were traveling 45, and you were maintaining your speed. What did you do then?

A. I immediately had to start to slow down.

Q. Now, at that time, where was your car with reference to the center line? [334]

(Testimony of Pat West.)

A. I pulled in behind the Pontiac at that time.

Q. Where was the Pontiac with reference to the center?

A. They were on the right hand side of the road.

Q. And proceeding in which direction?

A. Westerly direction.

Q. And then what did the Pontiac do?

A. It continued to brake down before it hit the bridge, before it came to the bridge, before it entered the bridge.

Q. And what did you do?

A. I then really had to slow down, I braked down.

Mr. Doepker: Speak up, please, witness.

A. I had to really force myself to brake down to keep from running into the back of the Pontiac.

Q. As the Pontiac went on to the bridge, are you able to estimate its speed?

A. 40 at the most, I would say.

Q. And the Pontiac was then where with reference to the center of the road?

A. They were on their own side of the road.

Q. Now, was there another vehicle in the vicinity at this time?

A. A red Buick was coming from a Westerly direction.

Q. Had you seen that Buick?

A. Yes, after I pulled over the knoll before you hit the bridge, I saw the Buick. [335]

Q. About where was the Buick then?

A. They were a quarter of a mile from me then.

(Testimony of Pat West.)

Q. And after—which direction was the Buick traveling? A. East.

Q. And at the time that the Pontiac had slowed and got on to the bridge, where was the Buick?

A. It was just coming on to the bridge.

Q. Are you able to estimate the speed of the Buick when you saw it?

A. I would say 60, 65.

Q. And then what happened?

A. They collided on the bridge, and the Buick was thrown up against the guard rail and bounced off and careened across the road immediately in front of my car.

Q. You say the Buick was careened against the guard rail?

A. Yes, it careened against the guard rail on the right side.

Q. And then where did it go—the guard rail on whose right side?

A. On the Buick's right side.

Q. With reference to north and south——

A. It would be the south side.

Q. On the south guard rail, and then the Buick proceeded where?

A. It careened across the road and went into the north [336] barrow pit immediately in front of my car.

Q. Your car—you say immediately in front of your car. Could you give us an idea of the distance?

A. Approximately 10 feet.

Q. And what was your car doing at that time?

(Testimony of Pat West.)

A. The left side.

Q. What did you find?

A. I tried to open the door, and it was jammed shut so that I couldn't, and I reached in the door and took the lady's pulse, and I could not receive any pulse at that time.

Q. Have you taken people's pulse?

A. Yes.

Q. Had some training in that in your first-aid training? A. Yes.

Q. How about your paratroop training?

A. Yes.

Q. Having done that, then what did you do? [339]

A. The children had returned to the car and were climbing back into the car.

Q. What were they doing?

A. They were trying to get their mother to sit up.

Q. So what did you do?

A. I took them from the car again and laid them down on the shoulder of the road and covered them up.

Q. Then, when—you laid them down on the road or what?

A. Yes, on the shoulder, and I asked a lady standing there if she would take care of those kids and keep them out of the car.

Q. And then there was a lady standing there?

A. Yes, there had been another vehicle drive up at that time.

(Testimony of Pat West.)

Q. Then where did you go?

A. Then, I went to the Pontiac where it was setting on the bridge.

Q. When you went to the Pontiac, was there anything about it that indicated something should be done or otherwise?

A. Yes, there was smoke rolling from under the dash on the Pontiac.

Q. What did you do?

A. I was going to open the hood and pry the battery cables loose to stop a short.

Q. Were you able to do that? [340]

A. No, the hood was jammed in so I couldn't open it.

Q. With respect to opening the hood, what did you do or use?

A. I tried to open the trunk to see if there was something in there that I could pry it loose, and I couldn't get the trunk opened.

Q. At this time what can you tell the Court about the position of the Pontiac with reference to the north rail of the bridge?

A. The right rear bumper was jammed into the north railing of the bridge.

Q. You couldn't get the trunk opened?

A. No.

Q. Then, what did you do?

A. After I couldn't get the trunk open, I tried to open the hood with just my bare hands. I couldn't do that either. It was jammed in. Then I proceeded to get them out of the car before it did start afire.

(Testimony of Pat West.)

Q. I show you now, Mr. West, a picture which is Picture No. 14 in Plaintiffs' Exhibit 4 and which I think the evidence in this case shows is the Pontiac after it had been pulled off the bridge and onto the west, and calling your attention to the hood in that picture, is that the way you found it?

A. No, the right fender, or the left fender was still intact [341] at that time.

Q. When you went up with reference to the fire? A. Yes.

Q. And showing you now a picture which is numbered 3 in Plaintiffs' Exhibit 4, and calling your attention to some metal to the south of the Pontiac that appears in that picture, what have you to say about that?

A. Well, that fender wasn't laying in the middle of the road there at that time.

Q. And with respect to Picture No. 5 in Plaintiffs' Exhibit 4?

A. No; that fender wasn't there at that time, either.

Q. I take it then that the fender was on the car when you were out there? A. Yes.

Q. Now, with respect to this Picture 14, which I showed you just a minute ago, and particularly the position of the hood as shown in that picture, in addition to the fender, what have you to say about the hood in that picture as compared, if there is a comparison, with the hood when you went up to the Pontiac?

(Testimony of Pat West.)

A. I would say it was in pretty much the same position.

Q. Pretty much the same position?

A. Yes. It is hard to tell without that fender on there, but there was no room between the fender and the hood to [342] reach in on top of the motor or find the battery or anything.

Q. Well, that is what I am getting at. You couldn't get to the battery, so what did you then do?

A. I decided I better get them out of the car.

Q. And who—what—who was in the Pontiac?

A. A man and a woman.

Q. On which side was the woman sitting?

A. On the right side.

Q. And the man on the—— A. Left.

Q. And which of those persons did you take out first? A. The woman.

Q. Were you alone at that time?

A. No; there was another gentleman there at the time that helped.

Q. When you took—just tell the Court what you did with respect to the woman?

A. Well, we took her from the car and carried her to the West end of the bridge and laid her down on the shoulder of the road, and then sent word with another person there to go get some blankets, and then we returned to the car to get the man out.

Q. Did you open any doors?

A. Yes; we opened the left-hand door at that time to remove the man. [343]

Q. The man was where?

(Testimony of Pat West.)

A. He was sitting behind the wheel.

Q. And with reference to any physical injury, did you see any?

A. Not at the time, no. He was in great pain.

Q. Well, what did you do in the way of getting him out?

A. Well, he was—his foot was jammed down beneath the brake pedal and when we attempted to pull him from the car, he screamed with pain very much, and we had to work his foot from under that brake, so I twisted his leg until we did get him from under the brake, and I took him from the car and laid him at the West end of the bridge beside the woman.

Q. Now, when you took him out of the car, you, and do you know who the other fellow was?

A. No; I didn't know him.

Q. Have you any idea?

A. Well, his car that was sitting there was an out-of-state car.

Q. Where did you take the man?

A. To the West end of the bridge and laid him beside the woman there.

Q. And what did you do with him?

A. There was a nurse, or a lady walked up then and asked if she could be any help, and I said yes, and she said that she was an R.N. I said, "Thank God, you take care of these [344] people," and then I returned to the other end of the bridge.

Q. When you say you returned to the other end of the bridge, that would be which end?

(Testimony of Pat West.)

A. Where the children were, on the east end.

Q. When you got to the other end of the bridge, what did you do then?

A. Well, they were deciding to take them in, and I had a station wagon, take them into the hospital, and this girl that had a panel, a laundry truck, I believe it was, she said she would take the children in with her, so I then said I would go to the other end of the bridge, and I would help take those people in.

Q. What did you do then?

A. I got in my car and crossed the bridge with my car.

Q. Up until this time, had any vehicles in the collision been moved? A. No.

Q. You got in your car at the east end and drove to the west end? A. Yes; that's right.

Q. Do you know whether any ambulance had arrived?

A. I believe one had arrived just—well, after that, it did. I had crossed the bridge.

Q. You had crossed the bridge?

A. Yes. [345]

Q. And after you had crossed the bridge, what did you do, if you recall?

A. We were going to load these people in my car, and the motor vapor locked on my car, and I couldn't start it again then, and then there was another station wagon sitting there. It was the nurse's husband's car, I believe, or another station wagon, and they said that they would take them in.

(Testimony of Pat West.)

Q. They said they would take, what persons are you referring to?

A. The people on the west end of the bridge.

Q. Now, about the ambulance, can you give me any more idea about when it came?

A. It came about that time because they said they would take over from there, and we left.

Q. When you say, "we left," who do you include?

A. Well, the laundry truck had crossed the bridge then.

Q. Do you know whether the Pontiac had been moved?

A. No, it hadn't been moved at that time.

Q. The laundry truck and who else?

A. Then the station wagon which was already on the west end of the bridge had turned around and proceeded toward Malta. Then by that time, my car had started, had cooled enough to start, and I followed them into Malta.

Q. Where did you go when you got to Malta?

A. Immediately to the hospital. [346]

Q. What was your purpose in going into Malta?

A. I thought that they would need help in unloading them, and then there was several blankets I had promised people I would bring back out from the hospital.

Q. These blankets, where had they come from?

A. Well, everybody down the line had brought blankets when we sent word out for blankets, and

(Testimony of Pat West.)

we had quite a number of them there from all the cars that were sitting up and down the road.

Q. How long did you stay in Malta?

A. Approximately a half-hour, 45 minutes.

Q. Then, where did you go?

A. Then I returned to Saco.

Q. What was the situation when you got back to the——

A. The cars were being removed then.

Q. And did you stop?

A. No, I never stopped on the way back at all.

Q. Now, going back to the place where you came into the bridge when the accident happened, the Pontiac, where was it with reference to the lane of travel you were in?

A. The Pontiac was on the right side of the road.

Q. Did it continue that way?

A. Yes, all while I followed it up until the time it entered the bridge.

Q. On its own right-hand side of the road? [347]

A. Yes.

Q. When you went—after you had stopped and went down to the Buick, the man that you said was there, did you tell me where he came from, what part of the car he got out of?

A. Yes, he got out of the right-hand front door.

Q. And what did he do?

A. He was quite dazed, and at the time when I first got over there, he was throwing bottles over

(Testimony of Pat West.)

the fence. That is the first thing that he was doing, picking the bottles that had fallen from the car.

Q. While you were there, did he take the children out of the car?

A. No, I took the children from the car.

Q. And did you ever have occasion to look at the back of the Buick?

A. Yes, sir, when I removed the children.

Q. Did you see anything in there besides the children?

A. Well, there was a beer case sitting in there with bottles in it.

Q. Sitting where? A. On the floor.

Q. Did the man in the Pontiac, do you know—or not the Pontiac, the man in the red Buick, do you know what attention was given to him, or care?

A. I tried to encourage him to lay down and I told him [348] that I would take care of the children and get them out of there, and at that time, he was bleeding quite badly from a wound in his head, and we said we would wrap it up, and he continued walking up and down the road, and finally he wrapped a handkerchief around his head there, but we couldn't get him to lay down. He just kept walking.

Q. Would you know, Mr. West, whether the man from the red Buick went up to the Pontiac, I mean immediately after the accident?

A. I don't believe so.

Q. Well, would you know, do you know who was the first person to get to that Pontiac?

(Testimony of Pat West.)

A. Yes, I was.

Q. Just for the record, Mr. West, when were you first contacted with reference to this action by myself, Mr. Angland, Mr. Morra, or anybody connected with us?

A. About two o'clock yesterday afternoon.

Q. Had anyone contacted you about the accident prior to that time? A. No, sir.

Mr. Alexander: I think you may examine.

Cross-Examination

By Mr. Doepker:

Q. How did this contact occur yesterday afternoon? [349] A. Pardon?

Q. How did the contact occur yesterday afternoon?

A. A fellow from Glasgow drove out to my place to see me.

Q. Who was the man from Glasgow?

A. Leonard Langen I believe his name was.

Q. Leonard Langen, is that an attorney?

A. Yes.

Q. And who did you first tell about your being on the scene? A. At that time?

Q. Well, later, or any time?

A. Well, after the accident happened there were several of us discussed it immediately after the accident.

Q. Who did you discuss it with immediately after the accident?

(Testimony of Pat West.)

A. I believe it was Bob O'Brien in Saco.

Q. Bob O'Brien, is that the man who runs the restaurant there? A. Yes.

Q. And when did you talk to him about it?

A. It was just that afternoon.

Q. The afternoon of the accident, and what did you tell him about it?

A. Well, I just told him I had come upon this accident.

Q. Did you give him the same details that you have given [350] here in Court today?

A. No.

Q. How much did you tell him about it?

A. I just told him this woman had been killed and that there had been quite a bad accident.

Q. What else? A. That was all.

Q. Did you say you helped the man and woman out of the Pontiac?

A. Yes, I said that I helped.

Q. You told that to Mr. O'Brien, too, did you?

A. Well, I imagine I did.

Q. Let's get your best memory of it. We don't want your imagination.

A. I'm not sure whether I told him that or not.

Q. You're not sure you told Mr. O'Brien you had helped the man and the woman out of the Pontiac? A. No.

Q. Did you tell him about helping the children out of the Buick?

A. I don't know, I don't remember.

Q. Well, what is your best judgment on it?

(Testimony of Pat West.)

A. I just don't remember whether I told him that or not.

Q. All right, now, you told me you talked to Mr. O'Brien about it on the afternoon of the accident, is that correct, [351] and who else around Saco did you talk to about it?

A. Oh, I don't know, I guess he was probably about the only one. Most of them had driven up here later and saw the accident themselves.

Q. Can you recall any other people who have lived in Saco or have lived there for any length of time while you were there that you mentioned it to?

A. No.

Q. Now, you don't know how Mr. Langen got your name, do you? A. No, I don't.

Q. Did you leave your name at the hospital when you went up there? A. No, I didn't.

Q. Did you contact any of the peace officers there and leave your name? A. No, I didn't.

Q. Didn't you think it would be important for a man who was an eye witness for the officers to know about you?

A. Well, officers were there at the time of the accident while I was there. They came about the time I was leaving. No one had approached me.

Q. Did you see the highway patrolman there?

A. I don't remember seeing his car at all.

Q. Did you see Mr. Dove, the Sheriff at Malta? [352]

A. I wouldn't know him if I saw him.

Q. Well, when you went into Malta on that oc-

(Testimony of Pat West.)

casion weren't some of the peace officers around there where those people had been taken to the hospital?

A. Nobody was at the hospital except the doctor and an intern, or a male nurse I believe he was, and the nurse that went with us and the lady that drove the laundry truck, and myself and the nurse's husband.

Q. Did you get the name of the lady that drove the laundry truck? A. No, I didn't.

Q. What kind of a looking woman was she?

A. Oh, golly, I couldn't tell you, I just don't—

Q. You talked to her there and asked her if she would take the children.

A. I just turned to her and I said, "Take care of these children while I go down to the other car."

Q. You didn't—how old a women would you say she was?

A. I wouldn't even estimate that.

Q. Well, you can tell us some idea about it can't you, within 10 or 12 years approximately?

Mr. Alexander: Objected to as argumentative. He said he doesn't know.

Mr. Doepker: That's all right.

The Court: Overruled. [353]

A. I would say she was approximately my age.

Q. How old are you? A. 32.

A. I don't remember that. I believe she had a pair of slacks on.

Q. How was she dressed?

(Testimony of Pat West.)

Q. A pair of slacks? A. Yes.

Q. Was she bare headed?

A. I don't recall.

Q. Well, now what was—give us some description of the man that helped you take the people out of the Pontiac.

A. Oh, gee, I couldn't tell you anything about that, I know he wasn't very tall, he was probably about my size.

Q. How tall are you?

A. Oh, about 5 foot 10, I guess.

Q. 5 foot 10, what do you weigh?

A. 185.

Q. How much? A. 185.

Q. Now, what was your work in Saco at this time, what work were you doing?

A. Lumber business.

Q. And who were you working for?

A. Monarch Lumber Company. [354]

Q. Were you an employee there, or were you the manager? A. I was manager.

Q. You were manager? A. Yes.

Q. Did you have any employees there in this lumber company?

A. Yes, I believe I had one at that time.

Q. Well, you would know if you had a man working there, wouldn't you?

A. I had a man part time. When he wasn't doing his regular work, why, I could get him to help me out for a day or a couple of days.

(Testimony of Pat West.)

Mr. Doepker: You mean the highway man?

The Court: No, Kapphan, whatever his name is, he testified that he saw this man at the scene of the accident. [357]

Mr. Doepker: All right.

Q. Now, then, when did you leave Saco?

A. Oh, between nine and ten that morning.

Q. When did you leave your work at Saco?

A. Oh, I believe I quit the company in September and left there the last of October or first of November, some place there, I don't remember.

Q. All right, now, let us go back. How did you reach in to where the woman was seated in the Buick when you went down the hill there on that occasion?

A. Through the left hand front door window.

Q. And was that front door open?

A. No, it was closed.

Q. Was the glass broke out of it?

A. I don't recall.

Q. Well, you had to reach through the window to get the feel of her pulse, did you not?

A. Yes. The window may have been left open, and I don't know whether it was broken or not.

Q. Now, where did you stop your car on this highway?

A. Almost immediately—I imagine my front bumper and the front bumper of the wrecker would have been just at the same place.

Q. How far ahead was the Pontiac car as you came over that hill there at that time? [358]

(Testimony of Pat West.)

A. How far ahead of me?

Q. Yes.

A. I attempted to pass the Pontiac just before coming to this knoll, and I pulled immediately in behind it and continued braking down. I was going at a higher rate of speed than he was and I had to brake down, and I saw this car coming, the red one.

Q. And when you saw that car coming, where was the Buick at that time?

A. They were on further up the road.

Q. Well, how much further would you say?

A. Well, I would say the distance between me and where I first saw the Buick was approximately a quarter of a mile.

Q. And when did you first see the Buick on this occasion?

A. I noticed it as I continued over the knoll, just as I come up over the top of the knoll.

Q. You think it was a quarter of a mile away as you were coming over the top of the knoll?

A. Yes, approximately.

The Court: Court will stand in recess until 10 minutes after 11.

(10-minute recess.)

Q. Did you see a panel laundry truck there driving along in that same area with you at the time you approached the top of the hill to the east of this bridge? [359] A. No.

Q. Did a panel truck, a laundry truck pull up along there behind you?

A. Behind me, yes.

Q. And how soon after you arrived on the west-

(Testimony of Pat West.)

erly side of the brow of that hill did the laundry truck come up?

A. It was quite soon after that.

Q. Well, could you give us a little better——

A. Maybe a couple of minutes.

Q. Maybe two minutes? A. Yes.

Q. And then where did the laundry truck stop, the panel truck?

A. I am not too sure where he stopped, the panel truck, I am not sure.

Q. Now, let us come back to the time that you are about to pass the Pontiac. Where was the Pontiac when you started to go around it?

A. It was just before the knoll.

Q. And then what was it that caused you not to pass it at that place?

A. I realized the bridge, I remembered that bridge there.

Q. You had been between Malta and Saco a number of times, hadn't you? A. Yes. [360]

Q. And were familiar with the sign to the right of the road that said "Narrow Bridges Ahead"?

A. I believe so, yes.

Q. You knew about that at the time?

A. Yes.

Q. And were you familiar with the place that you were driving right at that time? A. Yes.

Q. And knew you were coming to the bridge, didn't you? A. Yes.

Q. Then, was there anything else that caused

(Testimony of Pat West.)

you to slow down and pull in behind the Pontiac car?

A. No, none other than the fact that I remembered the bridge there.

Q. I see. And you saw the Pontiac car break over the hill? A. Yes.

Q. And at that time, how far behind it were you?

A. I had pulled in behind it at that time.

Q. Approximately how far behind it, though?

A. Oh, probably 50 or 60 feet.

Q. When did you apply your brakes, or how did you come to stop?

A. As soon as I decided to pull back in, I started braking my car at that time.

Q. And give us some definite idea now as to where you [361] started braking your car with respect to the brow of the hill?

A. Probably it would be, oh, up to the brow of the hill.

Q. Almost to the what?

A. Almost to the top of the brow.

Q. Now, when did you decide to bring your car to a complete stop?

A. When I noticed the Pontiac was slowing down much faster than I was.

Q. And the Pontiac was slowing down coming into the bridge, was it? A. Yes.

Q. Now, do you know—what would be your judgment of the distance from the brow of the hill to the bridge?

(Testimony of Pat West.)

A. Just familiarity with the road.

Q. No, what I mean, I am trying to get you to estimate the distance from the brow of the hill to the bridge?

A. Oh, I would say it is 200 feet approximately.

Q. Now, then, you were following the Pontiac coming over the brow of the hill? A. Yes.

Q. And then the Pontiac was how far from the bridge do you estimate at the time you come over the brow of the hill?

A. Oh, a hundred feet, 120.

Q. So, the Pontiac was 120 feet from the bridge, and at that same time, you say the Buick was back approximately a quarter [362] of a mile?

A. From where I was, yes.

Q. Well, from where you were, yes, and you were about 200 feet from the bridge, weren't you?

A. Yes.

Q. You were up at the top of the hill. Now, then while this Pontiac came down into the bridge from 120 feet on to the bridge—— A. Yes.

Q. Do you say now that this Buick traveled a quarter of a mile, or approximately a quarter of a mile in to where the scene of the accident was?

A. No, a quarter of a mile from where I first saw the Buick.

Q. Well, let's get some—this is important, let's get it into some detail, if you saw it——

A. Approximately a thousand feet.

Q. You think that the Buick came a thousand feet while the Pontiac was going 120 feet?

(Testimony of Pat West.)

A. Let's see, I was trying to figure out, 200 feet from the crest of the hill—well, it would be approximately 800 feet from where I saw it until it hit the bridge.

Q. Well, then, do you say that the Buick traveled 800 feet while the Pontiac traveled 120 feet reaching the bridge, is that right? A. Yes. [363]

Q. Now, the Pontiac remained on its own side of the road? A. Yes.

Q. And the cars came together with the Pontiac on its own side of the road? A. Yes.

Q. You are sure about that?

A. They went on to the bridge on the right hand side of the road.

Q. Well, that isn't what I asked you. Did the cars come together on the Pontiac's right hand side of the bridge?

A. The Pontiac was on the right hand side of the bridge, yes.

Q. And in the collision, they came together on the right hand side of the bridge?

A. Yes. The car was on the right hand side of the bridge. They didn't both hit in the right hand side.

Q. Well, let's change it then this way: The right hand side, as far as your side of the highway was concerned, would be the north side? A. Yes.

Q. And the Buick, traveling in a proper lane, would be on the south side, wouldn't it?

A. Yes.

Q. All right, then the collision occurred on the

(Testimony of Pat West.)

north half of the highway on the bridge, is that right? [364] A. Yes.

Q. And that is as you saw it? A. Yes.

Q. Now, did the position change in the collision?

A. Yes, the cars were twisted in the road, and the Buick was slammed up against the railing.

Q. I call your attention to Plaintiffs' Exhibit 4, Picture 11. Do you recognize that scene there?

A. No, I don't.

Q. You don't recognize it?

A. No, that wrecker wasn't there.

Q. Oh, I don't mean the wrecker, I am talking about the scene.

A. I recognize the position of the car.

Q. Now, then, you saw this Pontiac slammed against the north side of the bridge, didn't you?

A. I saw, yes, it was pushed into the bridge railing.

Q. Well, it was slammed against it, wasn't it, if it was hit on the north side in collision with the Buick, wasn't it slammed against the north side?

Mr. Alexander: Now, just a minute, that is objected to as argumentative and not the statement of any evidence that came in in this case.

Mr. Doepker: Well, he said it was pushed against the north side of the bridge. [365]

The Court: The objection is sustained. That is what he said. You are trying to make him say it was slammed. You don't have to try to make him say it. Just have him tell the story.

(Testimony of Pat West.)

Q. All right. What part of the Pontiac went against the north side of the bridge?

A. It was the rear bumper and rear fender.

Q. The rear bumper or rear fender?

A. Yes.

Q. Now, were you able when you went down to get the lady out of the Pontiac to go around the rear bumper?

A. No.

Q. Which way did you come in?

A. I walked around in front.

Q. You walked around in front. So that as the cars came together, the Pontiac was on the north side?

A. Yes.

Q. And when the Buick went through, it went down in the barrow pit, didn't it?

A. Yes.

Q. Now, what change was made in the position of the Pontiac as the Buick went through there?

A. It was left sitting dead still, right where it is at.

Q. So that another part of this thing that you recall is that the Pontiac was sitting dead still after the collision?

A. It was. [366]

Q. It wasn't moved from the time that they collided until the Buick went around the barrow pit?

A. No.

Q. So that it is in the same position standing here as you recall it as it was at the time of the collision?

A. Except that the car was pressed in firmly against the bridge here.

Q. Well, then, there would be that difference

(Testimony of Pat West.)

that the Pontiac was pressed firmly against the bridge, is that it, now? A. Yes.

Q. Did you observe in the instant of the collision how the two cars came together?

A. Well, as I was braking down, the cars hit, and the Buick was thrown into the bridge railing and careened across in front of me, and I was stopping to prevent from getting hit with the Buick when it come across the road.

Q. So, do I understand that you didn't get the exact position when they came together?

A. I saw the cars as they hit, and the Pontiac was continued on the right hand side of the road.

Q. All right, let's get some cars and see if you can give us an illustration. You take two cars here—we will call the yellow one the Pontiac and the red one the Buick. A. Yes.

Q. Let's call the line here (indicating) the approximate [367] center line of the bridge, and illustrate for his Honor your recollection of how the cars came together?

A. Well, as they came—this is the bridge (indicating)?

Q. Yes, this is the bridge.

A. The Pontiac came in on its side of the road, the right hand side, the north side of the road. As the Buick came in on to the road, the collision was hit here, and the Buick was thrown this way——

Q. Well, let's have the cars come together, please, as near as you can, how did they come together?

A. They must have locked right in here, or in

(Testimony of Pat West.)

this position because this car was on the right hand side of the road. The accident couldn't have happened that way. I was watching the back of this car. That was the one I was afraid of running into, that was why I was braking down.

Q. I thought you was braking down so the Buick wouldn't run into you?

A. Well, I had to stay out of the way of this Pontiac to start with. That was before the accident.

Q. All right, then, the collision occurred on the bridge. What is your best judgment of approximately where?

A. Well, I would say the distances on this to the bridge, it was right about in here. Of course, the cars you have got here are a little long——

The Court: Indicating the last third of the bridge? [368]

A. Indicating the last third of the bridge, yes.

Q. And, then, the way you have it illustrated there, they were both on their own side at the time of the collision?

A. No, I say that the Pontiac went on to the bridge on the right hand side of the road——

Q. Yes.

A. And the collision occurred. Now, this car, I wasn't watching where it was going, whether it was over on the wrong side. It must have been to hit the Pontiac, because the Pontiac was on the right hand side of the road.

Q. Coming on the bridge?

(Testimony of Pat West.)

The Court: Let me get this straight, what you are saying, that you didn't see the impact, you just saw the car ahead of you?

A. No, I saw the impact, your Honor, yes, but to put the wheels of this car across that road, I couldn't say that because I wasn't watching the line, but I saw the impact, I saw the Buick hit the bridge railing, and that is when it come right around in front of my car.

Q. Well, now, let's get that part of your recollection straight. You say you think that the cars then hit in such a position that the Buick careened over after the collision——

A. After the collision, the Buick hit the bridge railing.

Q. Then, the collision occurred further down the bridge so that the Buick careened after the accident, is that it? [369]

A. Yes, it hit the bridge after it hit the Pontiac.

Q. After it hit the Pontiac. And then the Pontiac, was the Pontiac driven back towards you?

A. The Pontiac was just lodged in there that way. It twisted in between the Buick and the rail when it hit, and when it hit, it just swooped it around, it spun it in the road.

Q. And the Pontiac was spinned after it was struck by the Buick and went in against the guard rail, is that right? A. Yes.

Q. And the Buick careened off and hit the side of the bridge, is that correct? A. Yes.

Q. And then did you make any examination of the cars afterwards?

(Testimony of Pat West.)

A. I never paid any attention to either one until I was trying to get the hood open on this one, and tried to open the left hand door on this one to get her out.

Q. I see. Thank you. I believe that this is a picture of the bridge looking toward Saco from Malta?

Mr. Alexander: Which one, Mr. Doepker?

A. That's right.

Q. Picture No. 4 of Exhibit 4. Then, would you say that the collision took place westerly from the place that the Buick struck the bridge, westerly from the place that the [370] Buick struck the bridge?

A. Westerly, that is towards Malta?

Q. Towards Malta.

A. They met and it hit afterwards.

Q. That is what you say?

A. I would say it was thrown immediately across from the car, it threw it immediately into the side of the bridge.

Q. You think that the impact pushed the Buick against the side of the bridge?

A. Yes, or threw it there.

Q. Yes, threw it there, or it glanced there, however it got there. So that the collision then took place, at the place where the cars came together, the Pontiac then immediately hit the bridge.

A. The Buick.

Q. Or the Buick, yes; and the Pontiac hit the bridge on the other side?

A. Yes, and it was twisted around.

(Testimony of Pat West.)

Q. Now, then after the cars had come together and had stopped in their respective positions, was the Pontiac over the center line?

A. After the accident?

Q. After the accident.

A. I don't remember seeing a line, but——

Q. There isn't any line there, I don't think. Was the Pontiac [371] still on its own side?

A. Yes, the back end was, but——

Q. I am interested——

A. In the position the car sits, yes, the front end was across the line, I would say, if there was a line there.

Q. Well, of course, this is a photograph. I want your memory of it, you was on the ground.

A. There was no line there. I couldn't actually say that the front end of the car was over the line, over the center.

Q. But the back end of it was against the north——

A. Against the bridge, yes.

Q. So that you couldn't get around it?

A. No, I couldn't get around it.

Q. I mean from behind? A. No.

Q. Now, then, after the collision, you went to the Buick first? A. Yes.

Q. Is that right? A. Yes.

Q. And, would you remember those children if you saw them that you took out of the car?

A. I don't believe I would, they were a boy and a girl.

(Testimony of Pat West.)

Q. And you took them out of the car?

A. Yes. [372]

Mr. Doepker: Michael and Catherine, will you stand up, please. Come up here.

Q. All right, that is near enough. Now, would you say that you took those two children out of the Buick car?

A. As to the way they were dressed, I wouldn't recognize them if I met them on the street. They were pretty well ruffled up, and they were both crying.

Q. Neither one of them was unconscious?

A. No, they were both conscious.

Q. They were both conscious? A. Yes.

Q. And where did you take them out of the car?

A. I took them both from the back seat.

Q. Took them both from the back seat?

A. Yes.

Q. And after you took them out, what did you do the first time you took them out?

A. I laid them on the shoulder of the road, tried to get them settled down while I found a blanket for them.

Q. All right. Then what happened?

A. The man asked me about his wife and I went to the car to try to get her out on the left hand side of the Buick.

Q. Yes. Then, in the meantime, had the children gone back into the Buick?

A. They went back in while I was trying to get her out of [373] the car.

(Testimony of Pat West.)

Q. And then did you take the children out the second time? A. Yes.

Q. And then after you took them out the second time, did they remain there, or did they go back again?

A. No, the woman showed up in this panel wagon. I asked her to keep them away from the car.

Q. So, you took the children out twice?

A. Yes.

Q. You are sure of that? A. Yes.

Q. On that occasion, and out of the Buick car?

A. Yes.

Q. And which side?

A. Out of the right side.

Q. Now, do I understand it that after this collision, you were the first car that came up behind the Pontiac? A. Yes.

Q. Then in a few minutes, the panel job came up, is that right? A. Yes.

Q. And where did the panel job stop with respect to you?

A. I don't recall where she stopped.

Q. Did she stop ahead of you?

A. No, she never stopped ahead of me. [374]

Q. So that she stopped behind you, at any rate, is that right? A. Yes.

Q. And then you had no difficulty in passing around the Pontiac with your car when you went to the other side of the bridge?

(Testimony of Pat West.)

A. No, I didn't.

Q. And during the time of your activity there, that car was not moved? A. No.

Q. It remained in that same position so that you had no trouble passing around it with your car? A. No, I didn't.

Q. How many times did you pass back and forth around the Pontiac?

A. I went by him once.

Q. You went by him once when, I mean with regard to the other people being there, was anybody else there?

A. Oh, there was other cars there by that time, there was quite a crowd.

Q. Did you notice how many cars went by that Pontiac while you were there?

A. No. I drove my car by and the laundry truck came through, and they left immediately after.

Q. And they went by, is that right?

A. Yes. [375]

Q. And there was no movement of the Pontiac before you went through, is that right?

A. Yes.

Q. Or before the panel job went through?

A. No.

Q. Had the officers got there, highway patrolman?

A. I don't believe there was any there at that time, no.

Q. So that there was—well, when you went

(Testimony of Pat West.)

through after, cars were on the other side of the bridge?

A. Yes, there was cars lined up on the other side of the bridge.

Q. And was it people from the other side that helped remove Mr. and Mrs. Schoepski?

A. I don't recall where he was from.

Q. But there was quite a few there at that time? A. Yes, quite a number of people.

Q. And you had not then yet moved your car, is that right? A. No.

Q. After you stopped suddenly, then you were unable to start your car right away, right?

A. No, I crossed the bridge in the car.

Q. No, I mean after you stopped suddenly on the east side, you were unable to start your car when you went back to it at first?

A. I crossed the bridge and stopped to pick these people [376] up and then I couldn't start it.

Q. Oh, I thought——

A. My car had been running all that time.

Q. Oh, your car went across the bridge before it vapor locked? A. Yes.

Q. To the west side, is that right?

The Court: Did you say it was running all the time when it first stopped?

A. Yes, I just jumped out and went over there.

Mr. Doepker: That is all.

Mr. Alexander: No redirect.

The Court: Very well, you may be excused.

(Witness excused.) [377]

WILLIAM C. DOVE

Direct Examination

My name is William C. Dove. I am sheriff of Phillips County, Montana. I have been sheriff for approximately two years now and before that I was undersheriff of Phillips County. On the 30th of August, 1955, I was sheriff and I remember the occasion of an automobile collision that occurred on a bridge east of Malta on the last of August, 1955. I am familiar with the bridge by Bowdoin Lake, and I received a call to go out to the scene of the accident. When I first got there, there was lots of traffic lined up on both ends of the bridge, and the ambulance passed me just before I got to the scene of the accident. The ambulance was driving faster than I was. I called the ambulance myself.

Q. Well, where was the traffic when you got there?

A. Lined on both sides of the bridge.

Q. And where was the ambulance when you got there?

A. At the bridge.

Q. Was it on the west side or the east side of the bridge? A. East side.

Q. East side. The ambulance then had gone through on to the other side?

A. I believe it was the west side. I wouldn't say for sure now where it was. [379]

Q. Okay. Well, whatever your best memory is?

A. I don't really remember which side of the bridge the ambulance was on.

(Testimony of William C. Dove.)

Q. Okay. Well, give us your best recollection of the events that transpired after you got there.

A. Well, they were loading on the people, but I believe it was the west side of the bridge. I couldn't say for sure. I helped, and as soon as we got the people that were hurt and the ambulance left, why I called for the wrecker and the photographer by radio. [380]

I have a radio attached to my car, and I called the photographer and wrecker by radio. It seems to me it was a matter of twenty minutes after I got there before the photographer got there, but I made no record of it at the time and I couldn't say for sure. The first thing that I did after I arrived at the scene of the accident was to help to remove the injured, then inquired if anybody had seen the accident. There were two highway maintenance men there and I talked to both of them and I talked to other people around there that I didn't know by sight and a few I did. I couldn't tell you who they were now. I was left with the impression that nobody had seen the accident. There were quite a few people around there and I asked for eye-witnesses at the time. Nobody came up to say that they had seen it.

Q. Did you see the young man that was just on the stand a moment ago there?

A. Not that I recall. [381]

I did not see him in connection with any activity in moving the people out of the Pontiac automobile or anything of that nature. I was not present when

(Testimony of William C. Dove.)

the people were moved out of the Pontiac and I couldn't have seen the people moved from the Pontiac because I wasn't there. I made an investigation on the ground concerning the accident later after the photographer and the highway patrol. When the highway patrol arrived, with respect to the photographer, the highway patrol arrived there just a few minutes later than the photographer as I recall it, but I was pretty busy with traffic and I couldn't say exactly. I asked the highway maintenance men to take over flagging the traffic. I put one on each end, and I also asked if anything had been moved at the scene, and I was informed by the highway maintenance men that they had wanted to move the Pontiac, but they wouldn't allow it to be moved, and they only moved one fender which would have been the left front fender in order to get a car through in order to take the children to town. They showed me where it had been laying and they marked the spot, and that had been swung around to the right out of the road so that the car could get through to take the children to town. The highway men pointed out to me the position in which the fender was before it was moved and I had them show me where it had been before they moved it and we moved it to the same. At any rate, we put the fender back so the photograph could be taken of it. When the highway patrolman and the photographer arrived, I made an investigation on the ground that at the place that the accident took place. I have had experience in investigating traffic ac-

(Testimony of William C. Dove.)

cidents in my capacity as sheriff and deputy sheriff and previous to being undersheriff and sheriff in law enforcements, but not exactly traffic accidents, but I was with the law enforcements in California for some time. In connection with law enforcement or particularly with respect to traffic investigations, I with Pete Leyman, who is Captain on the Highway Patrol, on a quite a number of accidents prior to the time that he was transferred out of our district, that is while I was undersheriff, and he showed me the procedure that they were trained under, and, of course, I get the F.B.I. manuals which do give you a lot of information which all law enforcement officers get, and I took a course from Boland Academy, criminology and law enforcement.

Q. And have made a study of conditions that appear after an [384] accident with relation to the position of automobiles at the time of collision and so on?

Mr. Alexander: Just a moment, that is objected to as leading.

The Court: Sustained.

Q. What does this study include?

A. Well, general law enforcement, mainly. It doesn't go into traffic accidents too much. [385]

I did not make an independent investigation before the photographer and highway patrol got there, but in connection with the photographer and the highway patrol, I did make an investigation. I am not giving my conclusions, but I will tell you what I

(Testimony of William C. Dove.)

observed. Directing attention to the things that could be seen or be observed on the ground to indicate the position of the cars at the time of the accident or the collision in detail well. There was a Pontiac car sitting on an angle in the easterly portion of the bridge with the front of it across the center line headed in a southwesterly direction. There was a red Buick in the ditch just off the east end of the bridge facing north, sitting right across the barrow pit with the nose of it in the bank on the north side. With relation to the bridge itself, I observed there were markings on the south side of the east portion of the bridge where a car had scraped along the bridge and there was red paint on the bridge, and there was also red paint on this Buick. The highway patrolman and myself measured the markings. I held the tape while he took the figures down, read the tape and marked it in his report book. I noticed the railings on the bridge, and I noticed with respect to the floor of the bridge, debris and there was debris at the front and looking at it, it would be to the right where the collision, assuming where the collision happened, there was debris under the Pontiac there. There was also debris which I assumed to be acid that probably was radiator fluid in the path where the Buick had taken to go into the ditch, and there was something there that I presumed was acid or radiator fluid that followed a course to where the Buick was in the ditch. The acid and radiator fluid was deposited along the south side of the bridge and then in a

(Testimony of William C. Dove.)

left angle to the ditch to the back end of the Buick. It seems to me that the acid and radiator fluid started with respect to the bridge itself as though it was a little ahead of where it hit the bridge, or where it scraped along the bridge. That is where it was most prominent anyway, but there was debris along the edge of the bridge also, and when I say ahead of the point where it scraped the bridge, I mean east of the point, yes it would be ahead of where the car hit the bridge. It would be ahead the way the car was pointed. The debris was on the south side of the road and it swung at an angle around to the north side of the road, and with relation to the Pontiac car, the debris was to the south side of the center line and the front end of it there. The front end was on the south side of the center line and there was debris there on the south side of the center line, with respect to this pile of dirt and directing to the position of the Pontiac automobile, this dirt or debris from the Pontiac, or in relation to the Pontiac as regards to the center of the highway, it was to the south of the center, and with respect to the debris to the west from the Buick car, it was on the south side of the center of the highway. I helped the highway patrolman with the measurements. I do not have the measurements myself, but the highway patrol have all the measurements. I didn't make a record of any of the measurements. I helped the highway patrolman make measurements and he made the sketch. I don't believe that my car is any of the photographs that I have looked at here

(Testimony of William C. Dove.)

in Court. I don't believe it is, it was parked on the west side of the bridge. When I arrived at the scene or upon the scene, and after having had report of the accident and went out there, there were a number of cars parked on the west side of the bridge, that is correct, and there were also cars that were parked on the east side of the bridge. The ambulance removed some of the injured persons and the ambulance arrived just ahead of me, it passed me just before a few miles, let's say 4 miles, before the scene of the accident. I recall telling you about putting the injured people in the car, that you yourself know about, the ones that were taken from the scene of the wreck. There were two gentlemen, and they were placed in the ambulance. I do not know whether there was a lady placed in the ambulance or not. She could have been in the front seat. The two gentlemen were laid in the ambulance in the back part of it, and to the best of my memory that is correct. Mr. Pat West has testified and said that he went in following the ambulance. I believe that is the record.

Q. Okay. Now, I believe that—I don't recall the exact testimony, but I believe that Mr. West said that he went in following the ambulance, I believe that is the record. What I wanted to fix now is what you did when you came out behind the ambulance there on that occasion. Did you have anything on your automobile to indicate you might be an officer or anything of that sort, or what did you have attached to your automobile?

(Testimony of William C. Dove.)

A. I had my blinker lights going, and when I arrived possibly a quarter of a mile from the scene, there was a lot of traffic—I shouldn't say traffic. There was a line of traffic that had been stalled or stopped, and some of them were trying to get out of line and go down, and I was required to use my siren intermittently in order to clear the way so I could get down to the scene of the accident.

Q. So, in addition to your blinker lights, you were using your siren?

A. Intermittently, yes, sir, off and on.

Q. Yes. Now, coming along there, your blinker lights were located on your automobile in what position?

A. There is one on the top close to the front, and then there is a blinker light on my right front fender.

Q. Is there anything on that blinker light on that right front fender?

A. It says, "Stop."

Q. It doesn't say "Sheriff" or anything of that sort?

A. No, sir.

Q. There is no indication in your car that you were Sheriff of Phillips County?

A. No, sir.

Q. Then, as you came up and were passing the traffic that was parked to the west of the bridge, and up to the bridge, when you arrived there, where was the ambulance?

A. Well, to the best of my memory, it was on the west side of the bridge. I know I assisted in getting the injured to the ambulance.

(Testimony of William C. Dove.)

Q. Now, in order to get the injured to the ambulance, were a part of the people who were injured taken from the east side of the bridge to the ambulance? A. Not while I was there.

Q. Not while you were there? A. No, sir.

Q. Then, the ambulance—the people were put in the ambulance from the west side, is that right?

A. That is the way I recall.

Q. All right. Now then after you arrived and pulled off in the position which you have indicated, which I assume was on the west side of the bridge, and near the ambulance, what did you do?

A. I went to the ambulance where a group of people were.

Q. Yes.

A. And the ambulance driver, Mr. Bell, was in charge, and the way I recall, they already had someone on the stretcher. If I recall right, I held the door open and helped him put the stretcher in the ambulance.

Q. All right. Now, then, at that time, did you make any announcement where the group of the people were inquiring about eye witnesses?

A. As soon as we got the injured in, I asked if anybody had seen the accident. I asked several different times, and nobody seemed to have seen it.

Q. At least, if anybody did see it, nobody made themselves known? A. That is correct.

Q. And were those requests of yours inquiring about eye witnesses made only in one position, or was it made around different places on the bridge?

(Testimony of William C. Dove.)

A. Well, I asked at the group that was by the ambulance.

Q. Yes.

A. And that is where the bulk of the people that were out of their cars were.

Q. I see.

A. And then I got on the east side of the bridge, I also asked over there.

Q. So it was on both sides of the bridge you spoke up—in what type of voice did you ask about it, low?

A. Well, I was in my shirt sleeves, and my star was showing very plainly, anybody could see who I was. I wasn't dressed with a suit on, I usually wear a different type of clothing and a big star, nickel plated star, and they knew I was in charge there, and I asked the general group if anybody seen the accident.

Q. Did anybody make a response to that?

A. No, sir.

To go back to the debris, with relation to the Pontiac car and the place on the bridge, my best recollection is that the debris was in the easterly end of the bridge. I suppose you would call it the east third portion, and on the south half and along the side of the Pontiac which would be the left side of the Pontiac, towards the rear, so that from the front to the rear and along the edge of the bridge where I assumed that the Buick had passed. There was debris to the left of the Pontiac and debris on

(Testimony of William C. Dove.)

the south side, along the bridge where I think the Buick evidently went circling around to go where it was, and the heaviest part of that debris was, with reference to the center of the highway, it would be to the south of the center. The debris would be, with respect to both the Pontiac and the Buick, there was debris to the front and left of the Pontiac and along the side of the Pontiac on the left side. In the position that I saw the Pontiac when I got there, the other debris was right along the side of the bridge, the south side, where the car had scraped the side. And compared to the debris which I have described as being near the Pontiac, the debris started right at the front of the Pontiac. The highway patrol and myself measured that across there, but I don't have the figures now, but to the best of my memory, it was directly across from the front of the Pontiac at the edge of the bridge. I recall some markings on the bridge there that Mr. Hardesty and myself measured. Mr. Hardesty, the highway patrolman. There was some sort of marking on the road there. I mean in the pavement itself, and that type of marking was that it was a gouge or a deep scratch. And that gouge or deep scratch, with reference to the position of the Pontiac, it was close to the front, but like I say, I didn't make any map of that, and we measured it, and I was holding one end of the tape, and the highway patrolman recorded it. It is correct that we made a record of the measurements at that time

(Testimony of William C. Dove.)

—Mr. Hardesty, the highway patrolman. And I assisted in making the measurements.

I remained around this bridge and the scene of the accident after I got there on that day, I can't say for sure, but it must have been at least two hours, and during that period of two hours after I arrived there, I was still around. I was around there until both cars were removed and the highway was clear—it must have taken two hours, and during all of that time I had my badge on my shirt as I was around there, and I had my automobile in the immediate vicinity of the bridge with the blinker light attached to it, or the two blinker lights attached to it.

Cross-Examination of Sheriff William C. Dove

When I first got out to the scene of this accident at the west end of the bridge, I said that they were in the process of moving the injured, yes, sir, and I assume that Mrs. Schoepski there, I don't know, I assume that she was the woman who was injured, I never saw her to recognize her. If I cannot assume, well, I don't know, and I don't recall that I saw her, and I never saw the two little children running around there. I heard them mentioned, but I never saw them. On my way out from Malta, I possibly could have met cars coming from the scene of the accident, particularly concerning, or having my attention called to a lavender and white laundry panel, I could possibly have, but I certainly don't remember it. As to whether there was a laundry panel at the scene of the accident, there

(Testimony of William C. Dove.)

was possibly a hundred cars there, maybe more, and there were not a hundred lavender and white ones, no, but there was just about everything else. And with respect to a green station wagon, I do not recall whether I met it proceeding into Malta, and before I got there, I don't recall any specific cars. I don't recall the laundry panel, two station wagons leaving just about at the time I got there ahead of the ambulance, no, I certainly don't. The announcement that I made about witnesses was made while the ambulance was being loaded with one person at the west end of the bridge. After we got the injured out, then I asked the question. As soon as we got them loaded, before anybody pulled out, before the ambulance. I don't know about the vehicle that might have left with, let us say the two children, who apparently were there, or with Mrs. Schoepski. I spoke of debris, and I am not sure what you mean, and what I mean by debris, and have been telling Mr. Doepker about, was pieces of car, pieces of glass, radiator fluid, dirt that you don't normally find on a highway, pieces of the bridge that were present.

Looking at picture No. 5 of Plaintiffs' Exhibit 4, the large whitewashed spot, the large whitish spot in front of the man with cowboy boots shown in the picture, was, I think, if you will recall, is where I said there was a trail left where I assumed to be battery acid or probably radiator fluid that I assumed to be the path of the Buick. There was debris in that, and what this whitish stuff is, I

(Testimony of William C. Dove.)

don't know. I don't know whether it was dirt or battery acid from the picture. From my observation out there that day, I don't recall what it was.

It was quite some feet from where the front of the Pontiac was, that you still found debris. I believe there was fragments of glass, yes, sir. With respect to the ambulance, I don't know how many people went back in the ambulance or whether they were male or female. There were two in the back, but what was in front, I don't know how many, and I have told you that at the west end of the bridge when I came there, they were loading in one person on a stretcher, and that is the way I recall it. I can only give you what I remember, and that is the way I remember it. I believe it's right that there was one man on a stretcher and one was laid along side the stretcher, if my memory is right, was laid on the floor along side the stretcher, and it was a man, it was the last one loaded, and the way I recall it, it was on the west end of the bridge. With respect to the other person who I think was in the ambulance, the first one was loaded on the stretcher and the next one was loaded along side of the stretcher, that was the second one to be loaded, and as to my testimony then that two people were loaded in the ambulance at the west end, that is the way I recall it, yes, sir. I don't recall why you, about your wondering if the ambulance had been at the east end and loaded any. I don't recall the ambulance going through, no, sir. Of course, they got there before I did. When I

(Testimony of William C. Dove.)

first testified as to where the ambulance was when I got there, I said the way I remembered it, it was at the west end, isn't that right. The way I recall it, it was the west end, and that is the way I remember it, yes, sir. I am pretty sure it was at the west end of the bridge and the ambulance was headed towards Malta, west. When I got there, it was headed west. There was an awful lot of people around it, and it was headed west. There was people around it, that is the way I recall it, yes, sir, and I don't know how it got headed west. It was stationary when I got there. Prior to the ambulance being headed west, I don't know how the ambulance got there. Between the time when I went to the west end and the people were loaded in the ambulance, when the ambulance left I contacted the two highway maintenance men that were there and asked them, I don't remember which one took, but I asked him to flag traffic, and asked him if parts had been moved or if anything had been touched. Then I went to the east end of the bridge and there I saw the Buick, well, I talked to the undertaker before that, asked him about the party in the car, of course, and then I went over to the end, on that end of the bridge to the Buick, yes, sir. The Buick had gone down the bank when I arrived there it was setting across the barrow pit, just about in a horizontal position. Horizontal with the axis of the highway, well, just about level, down in the barrow pit, across the barrow pit, and its nose was up in the bank.

DOUGLAS HARDESTY

Direct Examination

My name is Douglas Hardesty. My occupation is that of a Montana Highway Patrolman, and I was such a highway patrolman on the 30th of August, 1955. During the early morning of that day, I was called to a accident that occurred east of Malta. After receiving the call, I was notified by radio, by the sheriff's office of Phillips County, approximately at 9:50 a.m. After getting the call, I had a man in custody and I stopped and left him at the County jail in Malta, and the undersheriff had been notified. I called him by radio and told him I had a man I wanted to leave in his custody, so I pulled up to the jail and turned the man over to the undersheriff and proceeded to the scene of the accident. I have a note made of the time that I arrived at the scene of the accident and it was 10:25 by my watch. When I arrived at the scene of the accident, I found Mr. Dove had already arrived and had been there for some time. Mr. Coles, the photographer, arrived subsequently, because after I saw the type of accident, I called the sheriff's office on the radio and asked that the photographer be notified. He had already been notified and was on his way out.

As to whether I have an independent recollection of what I discovered there at the scene of the accident or having a memorandum, yes sir, I have made a diagram at the time at the scene of the accident, and the diagram includes measurements, the length

(Testimony of Douglas Hardesty.)

of the bridge, the width of the bridge, the distance from the east end of the bridge to the first marks on the south rail, the distance from the east end of the bridge to the mark which I believe to have been made by the Pontiac on the north side of the bridge, and the distance from the front end of the Pontiac in its position that I found it to the south railing, not the railing itself, but that portion which they call the stringer, which is on the road bed. I made measurements to that, that is, the effective width, and I have my notes here and I can tell you what other measurements were made by me. In addition to those measurements which I described, I measured the gouge mark, a deep scratch, which was between the Pontiac and the south side of the road, and I measured that in reference to its position between the Pontiac and the bridge, measuring to the bridge. Also, I didn't measure with a steel tape, but I stepped off the distance from the east end of the bridge to the rear of the Buick. I mentioned the length of the bridge, and the width and so forth. I made two measurements in regard to the Pontiac, one from the easternmost position to the bridge and one from the westerlymost position to the bridge. That would be the front end of the Pontiac. It was sitting at an angle. I also measured the length of the marks on the south side of the bridge which I attributed to the path of the car going towards the east, which was the Buick, and made a note of a gouge mark which was nearly between the ends of the bridge on the east side with relationship

(Testimony of Douglas Hardesty.)

to its distance from the south side, and it was in the path that one of the cars took, and I made a note of its position. I don't know whether or not it shows on the photograph or anything, but I made a note of it in my notes. I believe that is the extent of the measurements that I made. From the records and measurements that I have made, I am able to sketch upon the Exhibit that is on the board the position of the Pontiac when I arrived there, and the indications that I stated that I measured on the ground, and I can do that.

(Here the witness, during a 15-minute recess, makes a sketch on the Exhibit.)

I have now sketched in some measurements that I made on the bridge at the time that I arrived and during the time of my stay there following this accident. I will indicate my measurements now to the Judge that I made during the recess, and show him what they are. I got the bridge to be 96 feet long. He shows it 96 feet $\frac{1}{8}$ inch (Plaintiffs' Exhibit 34). I didn't make any change there. I measured 19 feet 1 inch, measuring this end of the bridge from the bottom stringer to the bottom stringer on the other side, showing only the actual road surface. I measured from the vehicle that was on the bridge, from this corner to the bridge was 6 foot 10 inches; from this corner of the vehicle to the bridge was 6 feet even (indicating).

Six feet ten inches is the first measurement and

(Testimony of Douglas Hardesty.)

the angle it was sitting was approximately this angle (indicating). It is about 18 feet from the bridge to this measurement here (indicating). I measured from this end to the first contact of any roughening of the bridge and found it to be 38 feet 8 inches, counting a projection which is not shown on this map. It would be one foot shorter. There is a little plank sticks out an exact foot. Then the bridge is scraped—there is paint on it for a distance of 19 feet in various spots. The last 19 feet 8 inches bore no evidence of contact. The colliding occurred in the first 19 feet, measuring from the westerly end. The west end of my measurements. I measured all mine from the east end of the bridge. Now, there was a gouge mark on the highway 2 feet 5 inches in length between the Pontiac car and the south railing of the bridge in this relative position (indicating). The west end of the mark was 5 feet 5 inches from the south portion. The eastern edge of the gouge was 4 feet 7 inches, indicating that the gouge had been made at an angle in reference to the length of the bridge. This mark out on the end which I have indicated was a mark I noticed. Apparently it was fresh. It was apparently made by one of the vehicles. There was a mark about 2 feet long, 5 feet 7 inches from the eastern end of the bridge to the north.

I have now indicated on the sketch the angle of the Pontiac, or the approximate angle of the Pontiac car as I found it on the bridge when I arrived there after the accident had happened. And I also

(Testimony of Douglas Hardesty.)

indicated on the sketch the first point which there appears a gouge or a paint mark. I have one measurement I have a note of here that I would like to add here. There is a bumper mark, what I believe to be a bumper mark, 5 feet 4 inches on the side of that railing, the south of the railing. Yes, sir, on the south railing. Five feet four inches. That is a gouge mark which I believe to be made by the rear end of a bumper. I don't believe I mentioned this little mark which I have made to the rear of the Pontiac, which is 25 feet 4 inches from the eastern end of the bridge, and I believe that mark to have been made by the Pontiac's rear bumper.

On that occasion, I observed debris or droppings off of automobiles in that vicinity. There was evidence of dirt, wood chips and some radiator, or fluid which I believe to be radiator fluid strewn around in that area. Before I arrived, someone, or some groups had picked up some of the metal parts of the car and placed them more or less in a pile down at the east end of the bridge, so I didn't make any specific mark showing any particular part of the cars, because as far as I know, those pieces had been moved. However, I did observe wood chips, radiator fluid and some dirt. With respect to those wood chips, radiator fluid and articles which I mentioned, and with reference to the center of the bridge, I may show on my diagram here where I show the wood chips. There were wood chips in this particular area right here, in

(Testimony of Douglas Hardesty.)

relation to the Pontiac car it would be south, near the point where I saw the scrapings on the bridge itself, they weren't large but they were present, that is the wood chips. There was some dirt under the front end of the Pontiac which was not apparent. After the Pontiac had been lifted up and moved away, there was a little dirt on the road to the rear of the Pontiac back here (indicating), not a great deal. I recall dirt in this area only along the front end of the Pontiac. There had been some drainings from the Pontiac which had run out of the radiator and had run to the west. I believe one of the photographs shows that.

Looking at photograph No. 3 of Plaintiffs' Exhibit 4, I was present when that photograph was taken, with reference to the bridge. Photograph 3 of Exhibit 4 correctly shows the position of the Pontiac car at the time that the photograph was taken with reference to the bridge, and indicating to Judge Murray the marking on the bridge that I believe was made by a portion of the Pontiac right there, sir (indicating), and I will describe that marking. It was a gouge and a mark. It looked as though something had been rubbed along there under pressure. The wood was depressed, and it was a mark such as you would get if you would put a heavy pressure on the board, gouged in there. It starts at the bottom and goes up at an angle. The first portion of the mark is lower than the last portion is and it appears on the top railing of the bridge on the north side. I have indicated, of

(Testimony of Douglas Hardesty.)

course, on the diagram and the measurement, the places on the east end of the bridge and along the south that bore the markings that have been indicated on this exhibit as nearly as I could, and I measured from the extreme end of the bridge. There is a small protruding portion which does not show on the diagram. It is about a foot in length. It is present on one of the pictures, it can be observed.

Paying attention to Plaintiffs' Exhibit No. 6, I indicate from that photograph the places that I found paint marks on the occasion of my examination. It was right along this area here for a period of 19 feet, right there, from there easterly for a period of approximately 19 feet, and it started in the vicinity of post No. 7 from the east. It would have to start east of post No. 7 and the mark is visible here. With regard to those paint markings along there, I don't know of my own knowledge whether they were there prior to the accident, I don't but they appeared to be fresh, made with red paint. I made an examination of one of the cars to see whether there had been any paint scraped off of it, and my findings in that respect were that on the right side of the Buick there was white paint which appeared to be from the bridge and the paint had been scraped down to the bare metal in some areas. There weren't any great large areas where it was scraped down to the bare metal, but the evidence of scraping was present.

Looking at Plaintiffs' Exhibits 13, 14, 15 and 16,

(Testimony of Douglas Hardesty.)

I examined those photographs, the said exhibits being photographs, and I recognize the vehicle and the scrape marks on it, and you can recognize the vehicle in the picture and the scrapings along the side, and those scrape marks are very much, even identical, to those I saw on the car at the time of the accident. I remember the position of the car in the barrow pit. The Buick had sloughed around from its own side of the road across the opposite traffic lane and had entered the barrow pit east of the bridge approximately 45 feet from the point it left the bridge, and it was nosed up against the cut bank of the barrow pit on the north side, and the rear was clear of the highway and sitting there at an angle, the lowest portion of the barrow pit about in the center of the car, and the entire vehicle was off the oiled surface of the road, and the vehicle was sitting in such a position that there was a space below it, and the barrow pit was run underneath it. The bottom of the barrow pit was about under the center of the vehicle, and the Buick would be across, but not right down in the bottom of the barrow pit, its nose wasn't in the lowest portion of the barrow pit. I have made an investigation of this collision and since have observed markings on the bridge. I was out there last week, and I can tell his Honor that as far as the markings at the easterly end of the bridge are concerned along that area, they are approximately in the same position they were right after the accident, yes, sir, they are still there.

(Testimony of Douglas Hardesty.)

Looking at Plaintiffs' Exhibit No. 17, being a stereoscopic view, I recognize the exhibit and what is shown in that stereo view, and it is one of the markings that was on the bridge right after the accident, that is, the gouge mark which I had reference to on the guard rail.

I recognize Plaintiffs' Exhibit No. 18, being a stereoscopic view, it is another angle of the same mark on the south side of the bridge.

Looking at Exhibit No. 19, I recognize that exhibit, being a stereoscopic view, that shows the south side of the bridge where the paint marks from the red vehicle from the extreme westerly end, or the extreme easterly end of the gouge mark. At the time of my investigation, right after the accident, it was present on the bridge at that time.

Looking at Exhibit No. 20, I recognize that exhibit. It is the south side of the bridge showing the paint marks east of the gouge marks, this is just an abrasion mark, where the car slid along the bridge rail. Referring to Exhibit No. 20, a stereoscopic view of the view, yes, sir, it shows another portion of the bridge. This one is backwards, if it is put in in this position, it shows the southern end of the bridge.

Exhibit No. 24 shows the southern end of the bridge in its entirety and this is the best picture. That shows the whole picture right there. It actually compiles several of them into the one picture. These stereoscopic exhibits correctly show the con-

(Testimony of Douglas Hardesty.)

dition that existed on the day of the accident after I got there and examined it. As far as the coloring on the bridge and the splintering on the bridge is concerned, the southern side of the bridge, they show the condition. There are all a little different picture or angle of what I have previously described and marked on the sketch. That is correct. Exhibit No. 24 is the best one, and I believe it portrays the south side of the bridge most honestly. From the appearance upon the bridge or markings approaching from either side, it did not appear that either one of the cars had braked, or had brakes applied before the collision.

Q. And from your experience as a Montana Highway Patrolman, and from your experience as an officer examining scenes after the wreck, where did the collision take place on the bridge?

Mr. Alexander: Just a minute, that is objected to as calling for the conclusion of the witness.

The Court: Sustained. Do you have any authority, counsel, that he is entitled to make such a conclusion?

Mr. Doepker: Well, your Honor, the only thing that I figured was that a witness of experience looking at a scene after—and describing it first to the Court and showing the position of the vehicles and the markings that appear on the highway, then, he relates a series of facts which your Honor can decide for yourself——

The Court: I don't think it is admissible, but to give you [426] an opportunity to present the

(Testimony of Douglas Hardesty.)

evidence, I will reserve ruling on the objection, and he may answer, and you can submit a brief with reference to it.

Mr. Doepker: Well, I would like to make a short qualification of the witness, and then I will call your Honor's attention to a case which my associate has refreshed my memory on.

The Court: Very well.

Q. Mr. Hardesty, how long have you served in your capacity as Highway Patrolman? [427]

I have served as a Highway Patrolman fifteen and a half years, with exception of the period I spent in the Navy during the war, a four-year period in the Navy during the war. I have had occasion to examine numerous accidents and numerous indications on highways after an accident has happened, and I have had the normal training they give a Highway Patrolman at the beginning. We have a six-week course at that time. Subsequently, we have various courses which are administered, the last, a period of about two weeks, which we had traffic investigation data given us. We are supplied with manuals which are published by the Northwestern Traffic Institute of the Northwestern University, and several of our Supervisors have attended there, and they have attended meetings and passed on information they obtained there.

A. Well, I expect that I have investigated over 2,000 accidents, well over that many.

Q. And, now, let me ask you this question: From your examination of the accident in question and

(Testimony of Douglas Hardesty.)

the automobiles involved, the markings you observed on the highway, do you believe that you know or reasonably know where the collision in this accident took place with respect to the bridge?

Mr. Angland: Just a minute, the question is objected to as duplicitous. He asked if he knew or if he reasonably knew. We object to the form of the question.

The Court: Sustained. Find out whether he is telling us what he—whether it is an opinion or a guess.

Q. Well, will you tell us—

The Court: Or if he has an opinion on the matter.

Q. Do you have an opinion, based upon your training and upon your examination of the accident in question, as to the place on that bridge where the collision took place, the impact took place?

Mr. Alexander: Now, just a minute. That is objected to on the ground that the question is duplicitous. It is apparently a sort of a hypothetical question without stating the facts upon which the hypothetical question is based.

The Court: Yes, it is. By its very nature it has to be a hypothetical question. Now, you can require him to set forth all the facts that are necessary for the witness to express an opinion.

Mr. Doepker: He has already done that in his testimony.

The Court: Well, I think so, I think that that

(Testimony of Douglas Hardesty.)

is true, and we are probably all aware of it, but I think for the record, he would have to show, you would have to ask him what facts he bases his opinion on, the places and the amount of debris, and the amount and places of scrapings and the position of the car when he found it, or the cars, and——

Q. Well, then let us ask him first, in order to lay a foundation, a question that he can answer yes or no, and ask him—I ask the witness—I ask you if you have an opinion at this time where the collision between those two cars occurred with relation to the bridge?

A. Yes, sir, I do have an opinion.

Q. And what is that opinion based upon? Relate the things that you are taking into consideration to base your opinion on?

A. Could I step over to the diagram, your Honor?

The Court: Yes.

A. Well, as to what happened back here or back here (indicating) I can't say. There is a condition on the east side of this highway which, unless you correct——

Mr. Alexander: Just a minute, we object to any condition on the east side of the highway.

A. It is related to this thing, in my opinion.

Mr. Doepker: I think he is entitled to answer the question.

The Court: Yes, you may tell what your opinion is based on.

A. All right—which, if you were, at the time

(Testimony of Douglas Hardesty.)

of this accident traveling from the east to the west, and didn't make a correction, as you came here, the crown of the road slants from the center to the northerly edge, and it is perfectly normal for you to correct——

Mr. Alexander: Now, just a moment. We object to the witness testifying what would be perfectly normal under the circumstances——

A. Well, if you don't want to hit the bridge, now, let's put it that way.

The Court: Well, in the first place, we are away off base. He is now testifying and basing his opinion on something that isn't in evidence, so let's go back. If you can't ask him the proper hypothetical question, why it's just too bad. We are not going to have him testify—you better present the proper question to him, or the objection will be sustained. We are not going to let him ramble on. You see, he has already started to talk about something that is not in evidence.

Q. Well, are there any facts that you have not related about this accident that is required for you to arrive at your conclusion of the place that this accident happened on the bridge?

A. No, sir, this portion back here is my own idea.

Q. All right.

A. The facts which I believe would indicate——

Mr. Alexander: Now, don't state what you believe. Just tell us what the facts are that you are relying on, Officer.

A. All right. This Pontiac has assumed an angle

(Testimony of Douglas Hardesty.)

here across the bridge occupying a portion approximately 18 feet, and the left hand front of the Pontiac is six feet 10 inches from the south rail. The south side of the Pontiac, the front portion on the left hand side is six feet from the side. There is red paint extending from two-thirds to three-quarters of the distance across the front of that Pontiac; south of the Pontiac on the bridge railing for 19 feet is red paint from the Buick. The distance through which this Buick would have to pass at the most here is six feet 19 inches. The width of the Buick is slightly over six feet, which would put the Buick up against the Pontiac on this side, and up against the bridge on the other side. There is no evidence of any accident west of that, so it is my conclusion that the Buick——

Mr. Alexander: Now, just a minute. We object to your conclusion, just keep telling us facts.

A. Well, you asked why I thought that.

Mr. Doepker: He has related——

The Court: Those are the facts.

Q. All right, now, based upon those facts, where, in your opinion, did the collision take place on that bridge?

Mr. Alexander: Just a minute, just let me make an objection, Officer. That is objected to upon the ground that it calls for a conclusion of the witness, that it relates to a subject which is not a proper subject of opinion evidence, that no foundation has been laid for any such opinion.

(Testimony of Douglas Hardesty.)

The Court: Well, I think your objection is good, counsel, at this point, but in order to preserve the opportunity for counsel to do it, I'll reserve ruling on the objection, and you may answer the question, but it is a matter you will have to submit authorities to me on.

Mr. Doepker: All right, I will submit the authorities to you later.

The Court: You may answer the question.

A. Would you read the question back, please?

(Question read back by Reporter.)

A. Well, I would say that the collision would have had to have taken place very near the front portion of this Pontiac in its present position, very near that, because there is no debris or anything which would lead me to believe it had taken place in another area.

Q. And on which side of the highway, north or south?

A. Well, it would be to the south of the center portion of the highway as I have concluded from what I saw there.

Q. All right, you may resume your place.

Mr. Doepker: The case of *State vs. Bosch*, your Honor, from Yellowstone County. I will give you the citation.

The Court: I noticed, Mr. Hardesty, that when you answered the question as to the point where the collision occurred, you pointed to the right hand side of the——

(Testimony of Douglas Hardesty.)

A. In that area with reference to the bridge, not to the Pontiac in its present position, that car having swung. That car could hardly have been going through the bridge at that angle.

The Court: Well, when you pointed to that corner, to the right hand front corner of the car as it is depicted on the sketch, is that the point where you think contact was made?

A. Right in this area, yes, sir, I believe it to be there (indicating). The car was carried across in that position. That car normally could not go through the bridge at that angle. It would be going parallel to the side of the bridge, or if it were not, before you went 90 feet, you wouldn't be in the road at all.

Q. (By Mr. Doepker) You may resume your place. Now, Officer Hardesty, were there any skid marks apparent on either side of the point of collision, that is, skid marks showing that brakes had been applied on either vehicle?

A. None that I could attribute to either of those vehicles, no, sir.

Q. Officer, have you examined vehicles in the course of your examination of highway accidents to determine the application of force to the front or sides of a vehicle? A. Yes, sir, I have.

Q. And I believe one of the witnesses who has testified out of order, to save calling you back to reach the subject, testified that there was a collision and a careening, or a careening against the side, the south side of the bridge, and then against the

(Testimony of Douglas Hardesty.)

side, the south side of the bridge, and then describing an arc in front of the witness. Now, if there had been, if the Buick car had, we will say, been forceably struck against the bridge with its right side, do you believe that it would show or would not show more evidence of damage than appears in Plaintiffs' Exhibits 14, 13, 15, and 16?

Mr. Alexander: Just a minute, Officer. To which we object upon the grounds and for the reason that the question assumes a state of facts not shown by the evidence, some reference to forceably slammed against the south rail; that the question calls for a conclusion of the witness in a matter on which the witness is not qualified or competent to answer.

The Court: Yes, the objection is good. There is no basis upon which he can make an opinion, no evidence whether the Buick was slammed or driven or whether it just barely scraped the side, or what the circumstances were of that.

Mr. Doepker: I don't have the benefit of his testimony, but I may have to call the officer back. I hope not, but my recollection was that it careened off of the wreck and banged against the side of the bridge and went on through. I don't know to what extent it went, but that is my recollection.

The Court: Well, what do you want him to testify about?

Mr. Doepker: About damage to the side of the Buick in an accident of the kind that was described by——

The Court: The damage is going to be, we all

(Testimony of Douglas Hardesty.)

know, the damage is going to be just relative to the amount of force with which the Buick hit the rail.

Mr. Doepker: Correct, your Honor.

The Court: And that is all. It is not going to be any greater or any less. What can he testify to? If there is slight damage, he just barely scraped it. If there is great damage, it was with greater force and thrown harder against it. It just depends.

Mr. Doepker: You may inquire.

Cross-Examination

By Mr. Angland:

Q. Officer Hardesty, I think you testified with reference to this diagram that the angle of the Pontiac is not intended to be accurate by this diagram?

A. Well, it would be relatively close, but not entirely so.

Q. Actually the two front wheels of the Pontiac would be, one would be in a northeasterly direction from your most westerly point here, wouldn't it?

A. Well, the inaccuracy there lies in this angle. That Pontiac was setting so that the measurement was six feet 10 inches from that corner to the bridge, and six feet from the right front corner to the bridge, so the degree of bending and so forth, I didn't have an accurate way of showing it on the diagram.

Q. The degree of bending and so forth?

(Testimony of Douglas Hardesty.)

A. In other words, this is only an approximation as to the angle that front has been damaged.

Q. Now, would the damage to the front end, and the position of the Pontiac be affected by the direction in which the Buick was traveling, that is, whether the Buick was traveling parallel to the southerly rail, or whether it was, say, in the middle of the bridge and then made a right turn to avoid a headon collision and get back on its proper side of the highway? Is that a possibility from the damage to the front of the car and the position in which you have illustrated the Pontiac was found?

A. Yes, sir, not being able to tell, which I stated, the exact angle at which the Buick hit the Pontiac, or the reverse, with which the Pontiac hit the Buick, there would be a difference in damage if you hit at an angle, yes, sir, there would. To that question, I would have to answer yes.

Q. If the Buick was traveling as I indicated?

A. In other words, if it was approaching so it was turned at the time.

Q. If the Buick entered the westerly end of the bridge astraddle the imaginary center line here—it isn't painted—the center line of the bridge and then turned to the right to avoid a headon collision and didn't get far enough over, you could have this result, couldn't you?

A. Well, certainly——

Q. It is a possibility?

A. It is a possibility. The angle, of course, must be figured, and you must know the direct angle of force. It would be a trigonometry problem, and

(Testimony of Douglas Hardesty.)

angles of force can be figured if the circumstances are known.

Q. Officer Hardesty, did you measure the distance from the first gouge that you noticed on the southerly rail of the rail or of the bridge, did you measure the distance from there to the point at which the Buick came to rest in the barrow pit east of the bridge?

A. No, sir, not in one tape measure, no, sir. I measured the distance to the end and then over to the Buick. In other words, it was two separate measurements, yes, sir, which would be approximately seventy—very nearly 80 feet from the first gouge on the bridge to the nose of the Buick.

Q. The Buick traveled 80 feet?

A. Yes, sir, very close to 80 feet. In fact, I believe it would be approximately 82 feet.

Q. And is that measuring from the first gouge to the back end of the Buick?

A. You would have to go around the front wheel where it was up against the bank.

Q. Does that make allowance for the quarter circle or arc?

A. Yes, sir, because you are measuring down to the end of the bridge and then around to the front of the Buick.

Q. Directing your attention, Officer Hardesty, to Photograph No. 12 of Plaintiffs' Exhibit 4, do you see some marking that I am indicating with my pencil here and here and here?

(Testimony of Douglas Hardesty.)

A. Yes, sir, here is the mark I put on the diagram.

Q. You are referring to the gouge?

A. Yes, sir.

Q. Now, did that gouge you are referring to appear to be straight easterly and westerly, or did it appear to run in an arc shape?

A. Well, an arc, as I understand it, would be a portion of a circle. It runs more straight than that, but the measurement would be such that in a distance of two and a half feet, it had moved from five feet five inches at the westerly end to four feet seven inches on the easterly end, so that it would be making an oblique mark toward the side of the bridge.

Q. Indicating then that that mark was made by some instrument which was moving in, we will say, from the northerly edge of the bridge to the southerly edge of the bridge, although it was only a short distance?

A. Yes, sir, it is two feet five inches long. It is slanted as I indicated there.

Q. It indicates it was made by something moving in that direction?

A. Yes, sir, that is correct.

Q. Now, directing your attention further to some marks in this same photograph beginning in the border of what has been referred to as some debris in the middle of the photograph, and moving across, appear to drop at one point toward the bottom of the photograph, and possibly pick up further, do

(Testimony of Douglas Hardesty.)

you recall seeing any marks at the scene of the accident that are portrayed in that photograph, those particular marks? Do you recall seeing those at the scene of the accident?

A. Yes, sir, I recall seeing those marks, but after the Pontiac had been picked up, these first marks you showed me——

Mr. Angland: Does your Honor know which ones I am talking about?

The Court: Yes.

A. This portion was covered by the Pontiac before it was moved. These scuff marks were there, but they are not in the nature of digging into the oil. This one is, this mark here. These are more scuffed on from dirt, you see. This is a gouge, where this is a scuff.

Q. Now, did they all appear to run in the same general direction, moving from the northerly to the southerly direction?

A. Well, I can't say, I can't answer it honestly and say yes.

Q. I don't want you to answer it if you can't answer it honestly.

A. No, sir, I can't say that all those marks moved in that direction. Those that you point out to me and that gouge mark did move from being farther north on the west portion to farther south on the south portion. They were farther north on the west portion, and they moved toward the south as you go east. That is probably the clearest way of saying that.

(Testimony of Douglas Hardesty.)

Q. That is what I am getting at, that's right. Officer Hardesty, could those marks be tire marks, what you officers refer to as tire burns?

A. I don't believe they could.

Q. You don't believe those could have been made by an automobile tire burning its way across the highway?

A. No, sir, I don't.

Q. And you don't think they are skid marks from a tire?

A. This mark here is only in the dirt, and I don't believe it could be connected to the impact. I believe it to be connected from something that has gone through there afterwards.

Q. Of course, Officer Hardesty, the Buick automobile did go through there after the impact?

A. Yes, sir, but not at that angle. You see why? The angle of this mark would not allow it to have gone through the bridge if it went there, the angle there is different. In other words, I don't believe that the angle the Buick was traveling is compatible with the possibility of the Buick having made this mark.

Q. Having made those marks, as I have indicated them to be possibly tire burns?

A. Well, the gouge mark I do believe to have been made by the Buick.

Q. You do?

A. Yes, sir, I do. I do not believe that this mark was made by either of the two cars. I think the mark in question there was made by one of the

(Testimony of Douglas Hardesty.)

vehicles that went through either prior to moving this or afterwards.

Q. Let me ask you a question, Officer Hardesty: In testifying in response to Mr. Doepker's questions concerning your experience and all, and bearing that in mind, if an automobile collides, we will say, a very fast automobile, does the debris drop immediately, or does it go through further with the force?

A. Well, let's put my answer in this manner: That the debris, if there were droppings from the car, which most would have dirt and so forth under them, they would tend to go in the direction of the force, yes, sir.

Q. And you found the debris that you have referred to in your testimony directly under the front of the Pontiac?

A. Yes, sir, there was debris under the front of the Pontiac that was apparent after the Pontiac had been lifted up, that is correct.

Q. And much of the parts that had been torn off the automobiles, I believe you said, had already been moved and cleared out of there by the time you got there, piled at the end of the bridge?

A. There was a bumper guard and several metallic pieces which had been picked up and placed at the east end of the bridge, and I believe one of the photographs shows them to be in that position, so what their position was prior to that time, I have no way of knowing.

Q. So you don't have the assistance of the location of those parts——

A. No, sir.

(Testimony of Douglas Hardesty.)

Q. —in making your determination as to the cause of the accident, or where you might think the actual impact took place?

A. Well, bearing in mind what assistance they might be, I would not have that, you are correct.

Q. They would be of some assistance if you knew exactly where those were immediately after the accident, it would help you in determining the point of impact, wouldn't it?

A. Well, if you could tell directly where those hit afterwards, yes, sir.

Q. If they were left alone.

A. Of course, where they might end up, you might not be able to tie them in except that they were traveling in that direction with considerable force. It may or may not help, yes, sir, you are correct.

Mr. Angland: I believe that is all.

Redirect Examination

By Mr. Doepker:

Q. I would like to ask two questions I overlooked. Are you familiar with the measurements of the cars that were involved in this accident as to width and length and the weight? Do you have any way of giving us that?

A. I don't have their definite weights, no sir.

Q. Do you have their measurements?

A. Yes, sir, I do have, I do know their length and width of those particular models.

(Testimony of Douglas Hardesty.)

Q. Will you give us the length and width of the models?

A. The length of a 1952 Pontiac is $202\frac{1}{2}$ inches over all. The width is $75\frac{11}{16}$ inches. A 1955 Buick of the series involved is 206.7 inches in length, and $76\frac{1}{4}$ inches in width.

Mr. Doepker: Nothing further.

Recross Examination

By Mr. Angland:

Q. Do you know the weights of the two automobiles, Officer Hardesty?

A. No, sir, I don't, I can't tell you exactly now. The day I obtained the length and width, I did obtain the weight also, but I didn't mark it down. The Buick is slightly the heavier of the two. It wouldn't be at all hard to get their weights. It is very easy to get the weights of those cars. The distances I gave is not the wheel base, it is the over-all dimensions.

Q. These are over-all dimensions?

A. Yes, the wheel base of a car is different than the over-all length. The wheel base is figured from the center of the axle to the center of the axle, the over-all length is from bumper to bumper, and the tread of a car is not the true width. The tread is—the over-all width is figured from the widest portion of one side of the car to the widest portion of the other.

Q. That is the way you measured the Buick?

(Testimony of Douglas Hardesty.)

A. No, sir, I didn't measure either one of these cars due to the damage involved. I obtained the measurements from the dealers.

Q. And the widest part of the Buick is 76 $\frac{1}{4}$ inches? A. That's right.

Q. Is that the front or the back that is the widest?

A. Well, sir, I wouldn't—it would be almost identical from the front to the back.

Q. That is 76 $\frac{1}{4}$ inches. You have a measurement, I believe, your easterly measurement from the front end of the Pontiac to the southerly end of the bridge—— A. It is 72 inches.

Q. 72 inches.

A. Six feet is 72 inches. I marked it six feet, and he mentioned it the other. I said six feet is 72 inches. I might point out further, too, now, that the measurements I pointed out were made from the inside of the stringer, which is a little over four inches in width, and consequently, this measurement is on the floor of the bridge, and it would put the bridge rail an additional four inches farther from the Pontiac. I stipulated that those measurements were made to the inside edge of the stringer which you have a picture of there, which would be closer to the vehicle than the bridge railing itself. If you bring a picture, I will show you.

Q. I know what you mean. The sleeper or stringer is four and a half inches, or four inches wide? A. A little over four inches.

Q. Then, your railing sticks out a little over two

(Testimony of Douglas Hardesty.)

inches? A. Yes, sir, that's right.

Q. So if we have got an automobile between the railing, if this measurement runs to the railing, it would be six feet two inches?

A. Whatever the difference between the stringer and the——

Q. Two-inch plank of the railing?

A. That is correct.

Q. So it would be about six feet two, or two and a half inches, wouldn't it?

A. Yes, sir, but I stipulated on the diagram that I measured on the floor of the bridge.

Q. Yes. What I am getting at is the front easterly front corner of the Pontiac and the railing of the bridge, couldn't be over six feet two or two and a half inches?

A. Well, in addition, to getting down to measuring a wreck of that sort, or damaged vehicle, the portion that I measured from there could possibly vary an inch one way or the other. I mean you couldn't possibly say that this is the only spot in which you could measure this vehicle. It was as close as I could measure it with the equipment I had on hand.

Q. Well, we have more than an inch one way or another, I think, involved with your figures.

A. That's right.

Q. Now, have you examined the photographs that are in evidence in this case, Officer Hardesty?

A. Well, I have seen them, because that is how these photographs so that I could look at them also,

(Testimony of Douglas Hardesty.)

and I did have a set which I looked through in Mr. Coles' studio, and I have subsequently seen them at various times.

Q. I am looking at what I think is No. 15 here. Directing your attention to Photograph No. 15 of Plaintiffs' Exhibit No. 4, now the left hand side, or the left side of the Buick is damaged back to a point near the rear door, isn't it? A. Yes, sir.

Q. Did you examine the Buick?

A. Yes, sir.

Q. Did you find damage, well, let's say a point just in front of the rear wheels back?

A. Well, let's say that I didn't see any damage from here back.

Q. You are indicating a point just in front of the right rear wheel—that would be the left side of it, wouldn't it, rather than the right?

A. This is the driver's side that he is showing me.

Q. Now, there was no damage from a point just in front of that rear wheel on the driver's side of the car to the back end of the car, and the back bumper was not torn off, was it? A. No, sir.

Q. Now, directing your attention to Plaintiffs' Exhibit No. 13, that, I believe, has been identified as a picture of the opposite side of the Buick?

A. Yes, sir, that is correct.

Q. Did you find the rear half, or the portion of that Buick back of the rear wheel on that side of the Buick caved in or damaged? A. Yes, sir.

Q. Was it caved clear in?

(Testimony of Douglas Hardesty.)

A. Not caved clear in, you said caved in or damaged.

Q. I beg your pardon, that was a duplicitous question. You did examine it? A. Yes, sir.

Q. Was it caved in?

A. Well, it is grooved.

Q. But actually, the body is pretty well intact at that part? A. Correct.

Q. So, the back end of the Buick, from the front of the rear wheels of the Buick——

A. Is pretty well intact.

Q. And also the bumper on the back of the Buick appears to be intact on that side as well as on the opposite side?

A. The bumper of the Buick here is the portion of the car which I believe tore that top part of the stringer off in the photograph which has been shown. That is where I believe that damage occurred, and there is evidence on the bumper that made me believe that.

Q. Well, the question I believe was, the bumper is intact?

A. Yes, sir, but you inferred that it wasn't damaged.

Q. No, I didn't infer that it wasn't damaged, I didn't see it, Officer.

A. Well, you asked me in the question before.

Q. Those two pictures illustrate pretty well the condition?

A. Pretty well the condition; in fact, almost exactly, that is correct.

(Testimony of Douglas Hardesty.)

Mr. Angland: Thank you, that is all.

Mr. Doepker: May the officer be excused?

The Court: I wonder—when you testified with reference to the point of the contact——

A. Yes.

The Court: Is there any evidence of what portions of the cars contacted?

A. From the evidence shown, the fact that they locked left front wheels, yes, sir. The left front wheels locked hard enough to bend the frames and wheels, so the point of contact would be very nearly at that point on the automobiles, yes, sir, there is.

The Court: Is there any—so the left front wheels locked at this point?

A. Well, at some point in that area.

The Court: And then, was the Pontiac driven back?

A. I would say it was driven back and sideways.

The Court: Well, is there any evidence on the road that it was driven back?

A. Yes, sir, there is.

The Court: What evidence?

A. Several gouge marks that this picture shows.

The Court: Did you put any of those marks on this map?

A. There are some marks where the Pontiac was sitting that were revealed after the Pontiac was raised, and they show gouge marks which I believe were caused when the Pontiac was pushed back.

The Court: Well, were the gouge marks made

(Testimony of Douglas Hardesty.)

before the debris was deposited there, or afterwards?

A. I would say about the same time. This mark, I believe, was made as the Buick tore on by.

The Court: Well, wouldn't the debris you have already testified to, wouldn't debris have been deposited at the point of impact?

A. Very nearly so.

The Court: Well, then, if it was deposited at the point of impact, and there was then later a dragging, the debris wouldn't have been under it.

A. Well, there is some dirt there——

The Court: Yes, quite obviously there is.

A. That would have to come from one of the two vehicles.

The Court: Why?

A. Well, at the time when the Pontiac was sitting in place, that was covered somewhat. There is a picture showing the Pontiac sitting there, and you can see back on this corner very little debris under the Pontiac at that point. The Pontiac had to be moved in this position. It couldn't possibly have started in that position, sir.

The Court: Well, can you show me on there the marks on that photo, No. 12 of Plaintiffs' Exhibit No. 4, the marks that indicate that the Pontiac, after the impact was driven back in an easterly direction?

A. No, only those scuff marks right there would indicate it, and they are very light.

The Court: Well, do you think if an automobile

(Testimony of Douglas Hardesty.)

was driven back by that force that you would only have a light——

A. You would have only light marks there.

The Court: That you would have only light marks?

A. Yes, sir, I think that it would be possible, that is, from what it shows at this particular scene. The rear of the car, in my opinion, went up slightly. There is one photo showing the rear of the car and this particular mark.

The Court: Is that the only mark on the north?

A. Yes, sir, that is the only mark.

The Court: So, the car didn't hit the north rail with very great force?

A. No, sir, only with the right rear bumper.

The Court: And not with great force?

A. Enough to put in a mark about that long.

The Court: Do you know much about—are you a physicist, do you know anything about physics?

A. I have had physics, yes, sir.

The Court: Well, what force would it take to move a car that was traveling at 45 miles per hour in a westerly direction, and weighing as much as that Pontiac weighed back east six feet?

A. I don't think it did drive it in the direction in which you are thinking. It has done this to it, sir, the force applied here has caused this effect, and then it has torn on by.

The Court: Yes, from what you have—what I am trying to find out, I am not—I am trying to find

(Testimony of Douglas Hardesty.)

out. Did you indicate that the front wheels locked at this point?

A. Well, not at that particular point, no.

The Court: Well, then, where?

A. In this area. I was judging that the angle that the Buick hit the bridge here——

The Court: Well, now, if it was in this area, could it have been north of this point that you indicate? A. No, sir, because——

The Court: Could it have been further west?

A. Yes.

The Court: How much?

A. I expect six or eight inches.

The Court: Well, in other words, this point that you indicate then is within six inches?

A. Well, I wouldn't say that it would be that close.

The Court: Well, how close?

A. In an area around a foot to 18 inches.

The Court: A foot or 18 inches farther west?

A. West, east, north, or any direction, yes, sir, because we would not be able to determine it any closer than that from the evidence that it showed.

The Court: If it was 18 inches farther north——

A. Yes, sir, then the angle to the north where this occurred would be a little different, and also the angle with which this car skidding along the bridge, the trajectory of the Buick would probably change. It is my belief that the Buick must have been traveling with greater force than the other car, and it tore on through after connecting here solid

(Testimony of Douglas Hardesty.)

enough to damage the front ends as it did, and this car spun relatively in its same position after the impact, but the other car went 80 feet beyond there.

The Court: Well, do you think then that the Pontiac car didn't travel any further after the impact?

A. No, sir, I don't think it did, it did only that (indicating).

The Court: It just spun?

A. Yes, sir, I think that is the effect on the Pontiac car.

The Court: Any further questions?

Redirect Examination

By Mr. Doepker:

Q. This Exhibit No. 33 has been identified as the front end of the, or the bumper of the Pontiac car. Is there any evidence which you would say indicated that there was an impact on the right side of this bumper in that collision?

Mr. Alexander: Just a minute, we want to make our objection. It calls for a conclusion of this witness for which no proper foundation has been laid, just so the record is clear.

The Court: What is the question?

Mr. Doepker: If there is any indication on this exhibit here that would show an impact on this curved part here from—if we could measure and get it exact. Any indication of damage on Exhibit

(Testimony of Douglas Hardesty.)

33 for the first 22 feet to the right of the right side of that bumper towards the center.

Mr. Alexander: You didn't mean 22 feet?

Mr. Doepker: 22 inches, I beg your pardon.

The Court: Well, are you asking him to do the same thing all the rest of us can do, look at it?

Mr. Doepker: Well, we are talking about impact on the right side, and this has got to be considered, here is the bumper. If there was an impact on it, there should be some evidence of it.

The Court: Well, you had better get some evidence in as to the condition of that bumper prior to the accident if it is going to be of any assistance to us, won't you?

Mr. Doepker: Oh, I don't think we could do that. We haven't seen it before the accident.

The Court: Well, I don't know, see, how can you tell. I see rust spots and holes in it.

Mr. Doepker: And you see red paint, your Honor, too, down in here, away over here on the right-hand side.

The Court: I don't know whether it is red paint or what it is. You see these things. Were they there before the accident, any of these things?

Mr. Doepker: I don't know; I didn't see the car before the accident.

The Court: Well, I don't know how much help you can be with that, you see, if we don't know what the condition was, do you?

Mr. Doepker: Well, I assume——

The Court: In other words, are we going to look

(Testimony of Douglas Hardesty.)

at this bumper, and there is a hole in it, is that hole made by the accident or——

Mr. Doepker: I don't think anybody can tell that. Some of these are where the thing was fastened with rivets, I imagine, onto the car, but if we see markings here that are of a color different than the car that it is on, we know that there——

The Court: Well, I can see those, I can see the discolorations——

Mr. Doepker: Yes.

The Court: And whether they are paint or not, I can't tell you.

Mr. Doepker: Well, you might if you make a close examination, your Honor.

The Court: I don't know if anyone can tell you, can they, without a chemical. I don't know what the color is, I, myself, don't. I don't know. I suppose you can have someone testify that the color there is the same as the color on the red Buick.

Mr. Doepker: Do you have an opinion on that, Officer?

A. Yes, sir, I do. Apparently I haven't been putting over what I believe too clearly. I believe that red mark not to prove the point of impact or anything. I think that was acquired or put on there after the two cars had spun around, the Buick continuing on its way pulled the Pontiac with it, and that red paint got on this bumper at the time the Buick went between this portion here and here, at the time that Buick broke through there, and I be-

(Testimony of Douglas Hardesty.)

lieve that paint got on the Pontiac bumper. That is my belief.

Q. (By Mr. Doepker): Well, I believe in examination by Judge Murray, they were indicating the right front corner of the Pontiac. What I was interested in——

The Court: No; that is the impact where he said the impact occurred, not the right front side of the Pontiac, I think you misunderstood. I didn't understand, and the witness never said that it was the right side of the Pontiac that first made contact with the Buick. He didn't say that.

The Witness: No, sir.

The Court: No; he never said that. I didn't understand it that way.

Mr. Doepker: I wanted to be sure, your Honor.

The Court: No. He said that the left front wheels, the area around the left front wheels was the point of original contact on both cars.

Mr. Doepker: Well, that is what I was concerned with. I thought your Honor had the idea the impact occurred over here on the right side of the Pontiac. I wanted further to have your Honor have the benefit of a photograph which he described in which the markings appear on the north side of the bridge.

The Court: Yes; I saw that, counsel.

Q. (By Mr. Doepker): And he was talking about the part of the Pontiac that he thought made this mark up here. Will you indicate to his Honor——

(Testimony of Douglas Hardesty.)

A. This portion of the bumper, your Honor. You see, the rear portion of the bumper on the right side is shaped the exact opposite of the mark which is indented into the bridge at this point, this mark and this bumper.

Q. So if that vehicle moved upward or was forced upward in the collision, would it make a mark in the position that is indicated there on the bridge? A. Yes, sir; it would, or it could.

Mr. Doepker: I believe that is all. Do you have anything further?

Mr. Alexander: Well, we want to use the officer in our case, but we don't have anything right now.

The Court: Very well, you may step down; call the next witness.

(Witness excused.)

Mr. Doepker: We offer this in evidence, this exhibit, because it has been used in the testimony, Plaintiffs' Exhibit 34.

Mr. Alexander: Is it offered for illustrative purposes only?

Mr. Doepker: It is offered for what it is worth with the explanation that goes with it in the record.

Mr. Alexander: We have no objection to it for the purpose of illustration, but as evidence of the truth of the facts appearing thereon, we object to it.

The Court: I suppose it can be offered as evidence of the truth of the facts with reference to the measurements of the bridge itself.

Mr. Doepker: And the measurements that the

officer made from the position that the Pontiac was in.

The Court: But the other measurements on there are——

Mr. Doepker: They are all accurate.

The Court: Yes, but they merely illustrate, don't they?

Mr. Doepker: The only thing they show is the location of the scraping places and the relative position of the two cars and the distance of the front end of the Pontiac from the rail.

The Court: I will overrule the objection and admit it.

(Plaintiffs' Exhibit 34, being the sketch above referred to, is on file in the Clerk's office in this cause.)

DOUGLAS HARDESTY

called as a witness on behalf of the defendant.

Direct Examination

Q. You are the same Mr. Hardesty who has heretofore testified in this case? A. Yes, sir.

Q. So you will understand the procedure, Mr. Hardesty, this is now the defense case. You stated you investigated the accident about which you have testified. I take it I would just be wasting the time of the Court to go into that matter again?

The Court: Yes.

Q. Now, Mr. Hardesty, did you, at the time you investigated the accident out at the scene of the

(Testimony of Douglas Hardesty.)

accident on August 30, 1955, determine or make any determination, from what you observed, and from your experience, or the speed of the Pontiac automobile? A. Yes, sir.

Q. You can answer that yes or no?

A. Yes, sir.

Q. And at approximately what speed do you believe the Pontiac was traveling?

A. In the neighborhood of 35 miles per hour.

Q. Mr. Hardesty, following the investigation at the scene of the accident—strike that. At the scene of the accident, did you have an opportunity to talk with Mr. O’Keefe, the plaintiff in this case?

A. No, sir; he had left the scene when I arrived.

Q. Did you interview Mr. O’Keefe at a later date? A. Yes, sir.

Q. When?

A. That afternoon in the hospital.

Q. And did you inquire of Mr. O’Keefe concerning the accident? A. Yes, sir.

Q. What did he tell you?

A. He told me he was in the back seat of the Buick.

Q. Did he tell you whether he was asleep in the back seat of the Buick or awake in the back seat of the Buick?

A. He indicated that he was awake and looking.

Q. Did Mr. O’Keefe tell you whether he was lying down or sitting up?

(Testimony of Douglas Hardesty.)

A. Well, I mentioned that he had been lying down at some point along the line, but he was in a position where he could see ahead at the time, so I would assume that he would be sitting up at that point.

Q. Did you talk with Mr. O'Keefe about where he had breakfast on the morning of August 30, 1955?

A. I don't believe that I asked him where he had breakfast on the morning, no, sir.

Q. Well, did you talk with him about having made a stop at the Choo Choo Inn in Malta, Montana?

A. Now, I don't recall whether Mr. O'Keefe told me about the Choo Choo Inn or someone I was just speaking to on that date. The Choo Choo Inn was mentioned by someone. Now, Mr. O'Keefe did not definitely tell me about the Choo Choo Inn, at least, I did not make a note of it at that time, and I am a little hazy about the Choo Choo Inn business. The Choo Choo Inn came up at the time the accident occurred, that same day, that someone had seen them at the Choo Choo Inn, or that they had stopped at the Choo Choo Inn.

Q. Well, for my own information, and for the record, I discussed this matter with you a week ago today, Mr. Hardesty.

A. Saturday, and I told you that I didn't have my notes with me, but we did mention that someone or some how the Choo Choo Inn had entered into it. However, I did not write down at the time that

(Testimony of Douglas Hardesty.)

Mr. O'Keefe had said that he stopped at the Choo Choo Inn. We mentioned the Choo Choo Inn when I was talking to you on Saturday, yes, but I—if I—I don't believe I stated definitely that they had eaten breakfast at the Choo Choo Inn, but in some connection, the Choo Choo Inn had entered into it, but whether someone else had been eating breakfast at the Choo Choo Inn and saw them, but I don't recall definitely, or have no record that would show that I knew of him to be at the Choo Choo Inn. You did ask me about it when we were talking last Saturday.

Q. Did you inquire—did you inquire of Mr. O'Keefe concerning the beer bottles?

A. Yes, I did. I asked him about the beer bottles in the Buick car.

Q. And what did he tell you?

A. Well, he told me—as near as I can remember, I didn't write that down, that they were collected for some boy, and that they were going to be turned in for the value that they represented.

Q. When he returned to Windsor?

A. Well, he didn't say when they were going to be turned in, and I didn't go into it at any great length, except that I asked him why there were so many beer bottles in the Buick.

The Court: Did he tell you that his boy was collecting them?

A. He could have, although I don't remember that he did tell me that.

The Court: Did you make any examination

(Testimony of Douglas Hardesty.)

around the scene of the accident besides the measurements that you have already testified to?

A. Nothing that wouldn't be preserved in the photographs, sir. You mean as regarding bottles on the road or the highway?

The Court: Yes.

A. I looked around and I saw bottles in the car.

The Court: But not outside of the car?

A. A few of them may have spilled out in the barrow pit, I don't know. There were a good number of beer bottles in the back of the car between the seat and the front seat on the floor of the car.

The Court: There would just be the bottles that would have spilled out of the car as a result of the doors opening and that sort of thing? Were there bottles thrown around some distance from the car?

A. Not that I noticed, no.

The Court: You looked around, did you?

A. Well, I don't recall any bottles, no, sir. I ordinarily look for them.

Q. (By Mr. Angland): Directing your attention to Photograph No. 2 of Plaintiffs' Exhibit No. 4, Mr. Hardesty, I note a box over near the Buick automobile. Do you know what that is?

A. Well, as I recall, that was a box with beer bottles in it.

Q. You don't know whether or not it came from the Buick automobile?

A. Well, I couldn't positively state that it came from the Buick automobile, but I believe that that

(Testimony of Douglas Hardesty.)

whole—I believe it was part of the stuff that was loaded in the Buick and had been set over there by someone. I talked to Gene Seel, the wrecker man, about that box of bottles setting over there. I didn't see it placed over there.

Q. You didn't?

A. No; I did not see it placed over there.

Q. There was a box?

A. Yes; there was a box; a beer bottle box or case.

Q. What about the trunk of the automobile?

A. Well, I saw it opened once, I believe, at the garage, and there appeared to be a case of beer or beer bottles in the trunk.

Q. You don't know whether it was beer or beer bottles?

A. Well, I recall that it was a case that had a name "Black" something or other on it, the name "Black" appeared on the stuff, it was either ale or beer, and it looked to me to be a full case. It could just as well have been a case of empties and closed again.

Q. Now, Mr. Hardesty, in the course of your duties, did you investigate, make any investigation concerning the death of Mrs. O'Keefe?

A. Concerning her death?

Q. Well, did you go down to the undertakers in the course of your duties?

A. Yes, sir; I did.

Q. And did you make a request of the undertaker?

A. Yes, sir.

(Testimony of Douglas Hardesty.)

Q. What was the nature of that request?

A. I requested a sample of her blood in order that we might get an alcoholic test of it for statistical purposes, and we had been requested to do that; all Highway Patrolmen, in any fatality, had been requested to obtain a blood sample of the drivers, if possible.

Q. Was the blood sample taken in your presence?

A. I was in the room in the morgue standing at the head of the table when the mortician took the blood sample, yes, sir.

Q. And did you, in the course of your duties, have that blood sample sent in for analysis?

A. Yes, sir.

Q. Did you receive a report from that analysis?

A. Yes, sir.

Q. Do you have that report with you?

A. Yes, sir.

Mr. Doepker: It is an unusual situation, of course, your Honor. I don't know whether a person has a right to take a sample from a person who is deceased or not. I presume that it is a matter which, if a proper foundation is laid——

The Court: They couldn't have taken the sample from her if she were alive, could they?

Mr. Doepker: No.

The Court: That would be a violation of the Constitution, a constitutional right.

Mr. Doepker: They couldn't without her consent.

(Testimony of Douglas Hardesty.)

Mr. Alexander: Not unless she consented.

The Court: Well, if she is in a position where she can't consent, where she is dead, certainly we have respect for the dead, too, as well as the living——

Mr. Doepker: Well, your Honor, I believe I'll just forget that objection, let him tell whether she was intoxicated or not.

The Court: Very well.

Mr. Doepker: He can tell whether she was intoxicated or not according to the blood sample.

The Court: Very well, you may answer the question.

Mr. Angland: I think the question was, "Do you have the report."

A. Yes; I have the report.

Mr. Angland: Well, I won't introduce the exhibit if he is going to let the witness testify concerning it.

The Court: That's fine. Is this witness in a position to know?

Mr. Angland: From the report. He has the report. You have the report with you?

A. Yes, sir, I have the report.

Q. (By Mr. Angland): Would you state the result of the examination as shown from that report?

A. In per cent of blood alcohol?

Q. Yes.

A. The report indicated that the blood test had .05 per cent blood alcohol.

(Testimony of Douglas Hardesty.)

Cross-Examination

Q. Is that, according to your experience as a Highway Patrolman, an indication that a person is under the influence of liquor?

A. Well, no, not to the extent of being under the influence to the degree that prosecution would result from that blood alcohol content level, or blood level content.

Q. Then, Officer, did you observe where the instrument came from that made—that the—was it the Coroner?

A. William Bell, the Coroner.

Q. Did you observe where he got the instrument he took the sample from?

A. The blood was obtained, I believe, from—

The Court: Not where the blood was obtained, but where did the instrument come from that was used in obtaining the blood?

A. He didn't use any instrument, sir, he used only the container; he pressed it up against the head and neck of the deceased and extracted a certain degree of fluid and blood.

Q. Did he make an incision with some instrument?

A. No, sir; he didn't; the incision was there, there was already bleeding from the neck portion right by the ear where he obtained the blood sample.

Q. All right, and where did he obtain the container? A. I gave him the container.

(Testimony of Douglas Hardesty.)

Q. You handed him the container yourself?

A. Yes.

Q. Was the container—had you had the container preserved in alcohol?

A. No, sir; I use the standard blood sample container which we are furnished.

Q. And that, was that the sample that he used to take blood from some wound on the person, is that it? A. Yes, sir.

Q. Do you have a chart which relates the blood alcoholic content where, for instance, one drink, two drinks, three drinks and so on, to the tests that are made with one drink, two drinks, and so on, do they have a relative blood percentage shown?

A. No, sir, I don't, because that would vary with the weight of the individual, and a larger person could drink the same amount of alcohol in reference to a smaller person, and the large person might not show the same level the smaller person would show.

Q. Then it isn't standard? A. No.

Q. I thought this .05 was shown in the Highway Manual as a person having one drink?

A. Well, on the average individual, that might be the representative value.

Q. And that would be one drink of beer or one ounce of whiskey, isn't that the way they put that?

A. Well, no; I don't believe so, because I have seen several examinations conducted in which measured amounts of alcohol were given, and it doesn't work out that way.

Q. It doesn't work out that way?

(Testimony of Douglas Hardesty.)

A. No. Other factors enter into it, such as the content of the stomach, if any, whether or not the test was made immediately after the alcohol was consumed, or whether it was made a half hour, 45 minutes, or hour later, so all those factors will enter into what the blood alcohol level will show.

Q. But at any rate, the test showed .05?

A. .05.

Q. .05, and at no time does the Highway Patrol arrest for being under the influence of liquor with that result, do they?

A. No, sir; they don't; no, sir.

Mr. Doepker: I think that is all.

The Court: Well, that is not a degree of intoxication at all, is it?

A. Yes, sir; it would be measured as the degree of intoxication, but you are not——

The Court: Well, do you mean if you have any alcohol in your blood at all, you are intoxicated?

A. No, sir. After the level reaches .15, which would be three times that much, you would be considered legally intoxicated by standards set up by——

The Court: You wouldn't legally be considered so in this Court.

A. Well, let's put it this way: The National Safety Council has set up as a standard that intoxication is present, that you are not considered under the influence of intoxicating liquor if your blood alcohol is .15. There you have reached a point where——

(Testimony of Douglas Hardesty.)

The Court: That is what I say, but .05 is no point of intoxication?

A. No; not a point of intoxication because it is not considered the intoxicated level.

The Court: It is no evidence of intoxication at all then?

A. Correct. I did not mean to be misleading. Blood level is an indication of a degree of intoxication, but up until a certain level is reached, you could not be considered intoxicated.

The Court: Very well.

Redirect Examination

By Mr. Angland:

Q. Mr. Hardesty, the .05 does indicate intoxicating beverages have been consumed?

A. Well, I would say that it indicated that something containing alcohol had been consumed.

Q. Yes. A. Yes, sir.

Q. And the effect on people varies from person to person, doesn't it?

A. Yes; I would say that the effect of alcohol varies from person to person.

Q. If a person wasn't used to drinking, and you said size affected them, in a small person it is possible that might affect their co-ordination?

A. This, of course, this test shows what blood level alcohol, so that size of the person has nothing to do with it after you determine his blood level content, no, I would say that .05 would not be——

(Testimony of Douglas Hardesty.)

Q. It wouldn't affect——

The Court: Even you and I can have that much, Emmett.

A. Well, in no case that I know of has that been considered a point where you are affected.

ALEXANDER JOHN FUZESY

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Marra:

Q. Will you state your name, please?

A. Alexander John Fuzesy.

Q. And where do you live?

A. Harlem, Montana.

Q. What is your profession?

A. I am a registered nurse.

Q. How long have you been a member of this profession?

A. I have been registered since 1951.

Q. Where did you receive your training?

A. At the Columbus School of Nursing in Great Falls.

Q. What is your present occupation?

A. We are running a rest home in Harlem.

Q. And what did you do before that?

A. I was administrator of the hospital in Malta, Montana.

Q. While you were the administrator of the hos-

(Testimony of Alexander John Fuzesy.)

pital in Malta, Montana, did you have occasion to see Walter Schoepski in your hospital as a patient?

A. Yes, I did.

Q. About when did he arrive at your hospital?

A. Oh, it was in August, the end of August, somewheres around [486] there, or the first of September, in between that period. I don't remember the exact date.

Q. Do you remember when he arrived at your hospital? A. Yes, I do.

Q. Did anyone else arrive at or about the same time?

A. Yes, there were his wife, another man and two little children. [487]

Q. Now, at the time Mr. Schoepski and Mr. O'Keefe and the children arrived at the hospital, did they have any luggage?

A. Well, not at that time, they didn't, I mean they just [488] carried them in, the people that brought them in. Their luggage was brought in later.

Mr. Doepker: I didn't hear you.

A. The luggage was brought in later. They were laid out—the kids were sitting in the front, I think, in the front of the truck, and the rest of them were in a station wagon and a truck, a laundry truck, I guess it was.

Q. Calling your attention particularly to the O'Keefe luggage, what did you observe about the O'Keefe luggage?

A. Well, most of it was brought in all loose,

(Testimony of Alexander John Fuzesy.)

clothes and groceries and some pots and pans and all kinds of stuff, and some beer. It looked like they were camping.

Q. You mentioned some beer, how much beer?

A. Well, there was some loose, I think about three or four cartons, I really couldn't say offhand. It was all put in this one room, and it was all just dumped there, and I didn't have a chance to really take a look at it.

Q. Was it in bottles? A. Yes.

Q. Not empty? A. No.

Q. They were full? How do you know they were full?

A. Because some of the girls were wondering why they had that much, you know, and I would have thrown them away when I shipped their stuff to them. [489]

Q. When you shipped their stuff to them, did you ship the beer to them, too?

A. Everything that was there, I put it in this one big box and sent it C.O.D. back to Canada. [490]

Q. You have mentioned something about a station wagon earlier? A. Yes.

Q. Do you remember any other vehicles that brought the injured in?

A. There were three or four of them. I know there was the station wagon, and this laundry truck, they were parked right [493] in the entrance, and there were some parked in front, you know, by the side of the hospital.

Q. Do you remember speaking to either any oc-

(Testimony of Alexander John Fuzesy.)

cupant of the station wagon or the laundry truck?

A. Well, I spoke to all of them. This one in the station wagon that was traveling with her husband was a registered nurse, and she helped considerable, she was a real big help. At the time, we had five patients come in all at once, we were kind of short, and then there was another girl, there was another girl and another nurse in another car, and the girl driving the laundry truck, she had the kids in the front with her, and she helped undress the kids and put the kids in bed.

Q. Do you remember anyone else?

A. There was a man there who helped, you know, helped us carry them in.

Q. Could you describe him at all?

A. No; I really don't remember.

Q. Anything about the condition of his clothes or otherwise?

A. Well, I know he was quite dirty and bloody. I told him to go wash himself, but I don't remember who he was.

Q. Well, was he a young man or an old man?

A. Well, he wasn't old, he was just a young man. He helped us carry all these people in and put them to bed.

Mr. Marra: That is all. [494]

WALTER SCHOEPSKI

the defendant, called as a witness on his own behalf.

Direct Examination

My name is Walter Schoepski. I'm the defendant and cross-complainant in these cases, and I live in Beloit, Wisconsin. I am 60 years old now. I was 59 at the time of the accident that gives rise to these cases. I started driving an automobile in 1927. I do not have an automobile now. I have not had one since the accident. I have always driven an automobile from 1927 up till August, 1955. I am married and my wife is sitting in the courtroom. We have a family, two, a boy and a girl; the girl is 26 and the boy is 25.

I left Beloit, Wisconsin, in August, 1955, on a vacation or something of that kind. We left Beloit, Wisconsin, on the 27th of August, 1955, and on the evening of August the 29th, 1955, we were in Williston, North Dakota. We arrived in Williston, North Dakota, I would say 5:30 or 6:00 o'clock, maybe, and we left Williston, North Dakota the following morning real early because it was dark when we left. We had the lights on the car when we left. I don't know exactly the time we left, but I estimate it to be around 5:30 o'clock and that would be Central Standard Time, and after we left Williston, North Dakota, we started west on Highway No. 2. We had no intoxicating liquors to drink before we left Williston that day, and we had none on the evening of August the 29th. We followed Highway

(Testimony of Walter Schoepski.)

No. 2 all the way, at approximately around 55 miles per hour except when we came through a town.

There is a narrow bridge sign at a point east of the bridge, and I recall that sign and at the time that I came to the sign, well, I took my foot off the gas and pressed on the brake a little bit to slow up. I took my foot off the gas and eased on the brake to slow down. I saw an automobile coming from the west towards me, and I continued on after passing that sign. Just where the automobile was that was coming from the west, I have a fair idea. Well, I would say it was about to enter the bridge at the same time that I did, to the best of my knowledge. Well, I knew it was a narrow bridge and I was trying to hug the rail and stay on my own side of the highway because I knew I was on a narrow bridge, on the right side of the highway. I stayed on the right side of the highway. I continued to hug the rail of the bridge which has been identified as the north rail of the bridge. My car didn't sway, my car didn't jump like a frog. The mechanical condition of my car was O.K. because I had the car checked over before we left on our vacation. I had it gone over. My eyesight was good, in fact the kind of work that I was doing before I left Beloit, Wisconsin, I worked in a machine shop, and I worked on a machine for the Gardner Machine Company. I was working on a boring bar. My work, quite a bit of it, is big work, boring holes, large type holes, all different sizes, a matter of fact, and it is a long bar that goes through the piece, whatever you are

(Testimony of Walter Schoepski.)

boring, you put a tube in there and that goes around that part of the hole, and we have to measure them holes while the bar is in there with the caliper, and we would have to hold them to a thousandth of an inch or less, in fact, the tolerance on the drawing calls for a half a thousand. It is supposed to be held to within half a thousandth of an inch so that my eyes are in good shape.

I don't recall exactly what happened at the time of the collision or the impact. I would say I was driving around 40 miles, maybe a little bit less, but I am sure I wasn't driving much over 40. I recall entering the bridge, and I recall hugging the north railing, and the next thing I recall is after the accident. The first thing I recall, I opened my eyes and the windshield was shattered, and when I saw the windshield was shattered, I passed right out again, and just opened my eyes and seen it, then I went right back out again. I don't remember anything. The next thing I heard, someone say he had a broken leg, and that is all I can remember right then, too. I don't know where I was, if I was in my automobile or out of it when I recall that. I think I was in the automobile yet then, but I don't know. I don't recall being moved out of the automobile. I don't recall anything else that was said at the scene of the accident, but I think I was lying down there and someone mentioned about the ambulance or it ought to be time for the ambulance to be there, or the length of this time it was taking. I don't know just what it was. I can't say for sure, but I

(Testimony of Walter Schoepski.)

heard someone say, "Here it comes," and the next thing I heard was, "They will be back in a minute, they have to turn around," but that is very vague; I just can barely remember that. I can't remember being loaded into the ambulance, and I can't recall the trip from the scene of the accident to the hospital in Malta. The first thing I recall at Malta Hospital, I think I was being moved, and some one asked me what my religion was. I don't know whether I was being taken out of the ambulance at that time or not, but it seems as though I was being moved. No, when I became conscious, it would just be a flash and that is all, and then I blacked out again, and I don't recall being in the room at the hospital; I don't remember anyone else that was in the hospital room with me when I was first taken in there; I don't know whether there was anyone in there or not. I will tell the Court the first thing that I recall, the first day in the hospital. Well, I think it was, I don't know just for sure, but I think this was the first day; Dr. Wiprud asked me where I hurt. I was sleeping and he had to wake me up, and I think I tried to tell him, but I couldn't talk, and I pointed up to my right side where I had broken ribs, no, I mean my left side, pardon me, and those ribs hurt very much while I was conscious, very bad, and if I talked, they hurt bad. My breathing hurt, too; I was unconscious, or I don't remember anything right about that time, the first day.

(Testimony of Walter Schoepski.)

Q. What about the second day in the hospital, Mr. Schoepski?

A. Well, the second day, I think it was in the morning, Mr. Fuzesy, he come in the room and he said my wife wanted to know whether he should notify our daughter about the accident. Of course, he had to wake me up, I was asleep, and I said, "Yes," and that is all I can remember at that time. I must have gone back to sleep because I don't remember anything else, but I told him to go ahead and notify our daughter.

Q. Did you later hear anything further about that?

A. It was that evening my daughter called long distance, and I was taken in—I was asleep then, and they woke me up and they connected a phone at the bed and I talked with her for a short while. She wanted to know how I was or what was the matter, and I told her I had a broken leg and that I hadn't seen her mother yet and I didn't know what was the matter with her, and I think I tried to say something else, but I don't know what other things I said. It was too hard to talk, it was painful to talk at that time.

Q. Now, do you remember whether or not anyone else was in a bed in your room at that time?

A. No.

Q. You don't know. Were you in an oxygen tent at that time, if you know?

A. I think I was because when they was connecting up that phone, it seems to me they had a

(Testimony of Walter Schoepski.)

quite a time with something [512] there, and I think that was the oxygen tent, that covering or whatever it was. [513]

(Here follows a description of the injuries sustained by Mr. Schoepski and the pain and suffering which he endured over the period of time that he was in the hospital.)

(The loss of wages which he sustained by reason of the injuries, his hospital bills, his cost of physicians' services and his present disability which is omitted from this record for the reason that the appellant is making no point about the extent of the damages sustained by Mr. Schoepski on this appeal. The damages sustained by Mr. Schoepski as far as this appeal is concerned is entirely irrelevant to the points which are being heard, urged by the appellant on this appeal.)

Cross-Examination

We left Williston before it was daylight. We had no set place we were going to stay that night, but we were directing our trip towards a vacation place. We were going to Glacier, we were going to Glacier Park. We did not have any reservations ahead or anything of that sort that we were trying to make. I had driven all the day before. We left Aberdeen the day before and we got to Williston that night, it was practically all day that I had been driving. I drove all day the day before Willis-

(Testimony of Walter Schoepski.)

ton, and I got to bed early in Williston; I would say about 8:30 o'clock in the evening, 8:30 or 9:00 o'clock. It was after dark when we went to bed. It would be Central Standard Time. I got up early in the morning and had breakfast; I did not make any stop between Williston and the scene of the accident, so I drove continuously then from that time until about 9:30 in the morning, and made no stops, and I had driven by myself the entire distance. We had a good night's sleep and I was not tired.

I never got out to the scene of the accident again; I haven't been out there at all.

As I came along there, I observed the narrow bridge sign ahead, and right before I came to that sign, I was sort down a little knoll; I couldn't see the bridge from the place where we first saw that sign. I don't remember seeing the bridge.

In driving and coming up over that knoll to the east where the sign is, you see the bridge, kind of down below you, and I did see the bridge a little bit below the level of when I was driving, and the bridge appears to be narrow compared with the road. I was only over this road the one time. I do not recall that the car, as you came over the top of that knoll, I don't recall that the car pulled you towards the left as you came down that last drive to the bridge. I would say that the car did not pull me towards the left, and as I was sitting there driving, I was on the left side of the car, and I did not try to make towards the center of the bridge

(Testimony of Walter Schoepski.)

to avoid the north rail; I tried to stay as close as I could to the north rail; that is what I was watching. I wouldn't say that I wanted to miss the north rail, too, or that I had to turn a little bit to start with to miss the north rail on the highway, and I don't think my car pulled me towards the center approaching the bridge I am talking about.

As I came over where that sign said "Narrow Bridges Ahead" and I came up there down that slight grade, I did see the Buick ahead, and I came up there on that slight grade, I did see the Buick approaching, and at that time I didn't see anything about the Buick, that is, I didn't see anything about it that caused me to be concerned at that time, and as far as I can remember, I didn't see that Buick off of its lane at any time, but I am sure that I stayed in my own lane. I don't remember anything right before and right after the accident.

My judgment and memory is that I was coming onto the Bridge on one side, the Buick was coming onto the bridge on the other side.

MRS. WALTER SCHOEPSKI

Witness called on behalf of the defendant.

My name is Mrs. Walter Schoepski. I am the wife of Walter Schoepski, the cross-complainant in this case. Mr. Schoepski and I have been married a little over 27 years, and we reside in Beloit, Wisconsin. I recall leaving Beloit, Wisconsin, back in August, 1955. We left very early in the morning, around

(Testimony of Mrs. Walter Schoepski.)

three in the morning. That was a Saturday. I wouldn't remember the exact date, but it was a Saturday prior to the accident, and we stayed on the evening of August the 29th, 1955, in Williston, North Dakota. We arrived in Williston the day before around 5:30. We always drove until my husband got tired or we found a motel that we wanted to stop in. We had no special time we stopped; just drove until we felt like it. We retired very early that evening at Williston, I would say 8:30 because I had broken a toe before I left home and I was hardly able to walk, so we didn't explore the town. I don't know when we got up in the morning, but it was dark; we had gone to bed early and decided when we woke up and were both awake, we would start. It was dark in the room. I got up and lifted the venetian blind and I just could see a streak of day, it wasn't daylight, and as long as we were awake, we decided to start driving; we like to drive early. We had breakfast in Williston. It was dark enough when we left Williston to have the lights on our car, but I don't know exactly what time it was.

As to my recalling the trip from Williston, North Dakota, to the scene of the accident, I don't remember anything about it. I don't remember the type of country it was in, whether it was flat or rolling, I don't remember a thing. I have tried very hard to remember; I thought maybe by seeing some of these pictures of the scene of the accident and hearing these people talk, that maybe it would bring

(Testimony of Mrs. Walter Schoepski.)

it back to me, but it hasn't brought a bit of it back; it is just gone, that is all. I remember leaving Williston, and I remember having the lights, getting in the car, and having the lights on, but that is the last I remember; and the next thing that I recall, I remember someone telling me that they were a registered nurse and "We will take care of you." I have found out since who it was. I have heard from this lady that was the registered nurse. She is from Oak Harbor, Washington. She was a tourist. She and her husband and two children were going east. I didn't know at the time who she was, it was just a voice, that's all. There wasn't even a person connected with it, as far as my memory serves me, and I don't know where I was at that time; I had no sensation of being whatsoever. I don't recall being taken into the Malta Hospital, or who took me in. Well, afterwards, I recall being in the Malta Hospital, but I don't remember being taken into the hospital or anything about my entrance to it. The first thing I can really remember distinctly is being very, very nauseated and vomiting very hard because it was very painful. I presume that was in the afternoon. A doctor was there and I remember him saying that "you've got to get the blood out of your stomach." I was told that I suffered a concussion. I was injured in this accident, too.

(Here Mrs. Schoepski relates her injuries and her observation of the injuries of her husband and it omitted from this record for the

(Testimony of Mrs. Walter Schoepski.)

reason that there is no point on the appellant's part in this appeal in reference to the damages sustained by Mr. or Mrs. Schoepski.)

Cross-Examination

I left the hospital on September the 10th and went back home.

(Deposition of Raymond O'Keefe.)

Mr. Alexander: At this time, your Honor, the defendant desires to offer in evidence the deposition of the witness Raymond O'Keefe taken before R. L. Robertson, a Notary Public for the State of Montana, residing at Great Falls, which deposition was taken on the 12th of August, 1956, being the portion of that deposition commencing with the question on line 6 of page 44 and continuing with all of the questions and answers down through—how much do you want?

Mr. Angland: I want to put in the part that you read to.

Mr. Doepker: You want it to start where?

Mr. Alexander: Starting with line 6, page 44.

Mr. Doepker: How far are you offering it?

Mr. Alexander: Our evidence. We are going to do it that way. Down through line 25 on page 44, which, as I recall, are the only questions and answers covered on the stand. I may be [569] mistaken.

Mr. Alexander: Well, I am offering the deposition to show——

The Court: Well, I will admit it. I think that covers, the offer covers that portion that shows what his answer was to the second question where he says, "Not for me, but for him."

Mr. Doepker: Yes, sir.

The Court: Very well, I'll admit it. [571]

DEPOSITION OF RAYMOND O'KEEFE

Q. Now, what kind of bottles were those?

A. Beer bottles.

Q. And about how many were there?

A. I don't know. I didn't know they were in there until that morning.

Q. Have you any idea how they got there?

A. Yes.

Q. How did they get there?

A. Well, I have a little lad at home that picks them up and when he was around these motels he thought he was getting something given to him and he was hiding them in the car and he was thinking he was going to sell them, and I got in the back that morning and I found the bottles when I got in to lay down and to move the blankets over and sleep, and I removed the blankets and he had them covered up.

Q. Well, now, when did you move the blankets to lie down and sleep?

A. For him to lie down and sleep. It was for him to lie down and sleep. [44]

DR. DUNCAN S. MacKENZIE, JR.,
called as a witness on behalf of defendant, being
first duly sworn, testified as follows:

Direct Examination

By Mr. Angland:

Q. State your name, please? [573]

A. Duncan S. MacKenzie, Jr.

Q. Where do you live?

A. In Havre, Montana.

Q. And what business or profession are you engaged in? A. Physician and surgeon.

Q. Licensed to practice in the State of Montana? A. Yes.

Q. And practicing your profession in Havre, Montana? A. Yes.

Q. What has your education been leading up to your practice of medicine, Doctor?

A. I received my M.D. Degree at the University of Minnesota in 1936. I had a year of internship, a year of residency, practiced two years and eight months, five years in the army, and ten and a half years practice since the army.

Q. And has that been a general practice?

A. General, yes. [574]

Q. Dr. MacKenzie, this does not have to do with the examination of Mr. Schoepski, but I wanted to ask you another question. Is it possible, or is there a medical explanation for a person who has been in a serious automobile accident, who has been un-

(Testimony of Dr. Duncan S. McKenzie.)

conscious for several hours, who has suffered a concussion, to forget events immediately before a particular incident that caused the concussion and the unconsciousness; is there a medical explanation for that condition?

A. I don't feel that I am qualified to try to explain it other than I am convinced in my own mind that it does happen at times.

Q. What do you call it? A. Amnesia.

Q. Retrograde amnesia?

A. Retrograde amnesia, yes. [578]

(Witness excused.)

The Court: Any more witnesses?

Mr. Alexander: The defendant and counter-claimant rests, except for the testimony of the witness Mabel Keough.

The Court: Very well, any rebuttal.

Mr. Doepker: Yes, your Honor. [579]

MRS. MABEL KEOUGH

called as a witness on behalf of the defendant.

My name is Mrs. Mabel Keough. I reside at the present time in Great Falls. I have resided in Great Falls since a year ago in August. I formerly resided in Glasgow in August, 1955, and I was employed in Glasgow in August, 1955; I worked in the Delux Cleaners in Glasgow. Worked in the Delux Cleaners approximately about 3 years. During August, 1955, the nature of my work was that I was the delivery girl in Glasgow and that I had a route going from Glasgow to Malta, and on that route, I made the trip from Glasgow twice a week. I had drove over that route about three times. I had just started it. We had just started the route in August, 1955. There was a vehicle that I used in the delivery route from Glasgow to Malta. I drove a panel wagon. It was a GMC. It was orchid on the bottom and white on top, trimmed in black. It had one seat, the driver's seat. Well, there was windows on both sides of it and there was a tall window in the door in the back where I put the laundry. Well, by my driver's seat and my right-hand side on the other door, there were windows and behind that window to the rear of the panel, it was plain, that is where we had our writing on it, there was no windows there, it was solid.

I came upon an accident at a bridge some 12 miles east of Malta August the 30th, 1955. Yes, I did, and when I came on that accident, I was on one of my regular routes to Malta. I left Glasgow that morning, I figured it was about 7:30, and I

(Testimony of Mrs. Mabel Keough.)

stopped at Hinsdale and picked up laundry and then I started off for Malta, from Hinsdale to Malta. I don't have any idea when I left Hinsdale. I just stopped in a cafe and they had the laundry ready and I picked it up and I left again, and that was about 29 miles from Glasgow. I do not know how far it was from Hinsdale to the place where I saw the accident. I was proceeding west on Highway U.S. No. 2. My speed from Hinsdale to the place of the accident was 40 to 45 miles per hour.

Q. When did you see any vehicle ahead of you proceeding westerly on U.S. Highway 2 that morning in the vicinity of the bridge?

A. The only car I can remember is when I came over the knoll, the hill behind the bridge there, I saw a light colored car.

Q. And was that light colored car eventually involved in some unusual event? A. Yes.

Q. When you came over the knoll of the hill?

A. Yes.

Q. And at that time, did you see any other vehicle coming from the east and proceeding—or coming, rather, from the west and proceeding east?

A. Well, in my mind I figured I did, I don't know if it is the truth or not. I figured I had seen the Buick, but I can't tell whether it was the truth or not. It is a muddle in my mind, I would say.

Q. Now, this light colored car that was ahead of you, on which side of the road was it [591] proceeding?

(Testimony of Mrs. Mabel Keough.)

A. It was on the right side of the road, my own side.

Q. Can you tell the Court about how fast it was going? A. No.

Q. What did you do when you came over the brow of the hill?

A. There was a station wagon that came up behind me, and he honked his horn and was going to pass me, and I saw this light colored car in front of me, and I put on my brakes.

The Court: You what?

A. I put on my brakes and slowed down, and that is when the accident happened.

Q. Now, this knoll that you speak of, is there anything there that will identify the knoll that you refer to?

A. It has a sign there that says, "Narrow Bridges," and it has so many miles ahead. I don't know how many miles it was.

Q. When this car honked and went to pass you, where were you when you started to slow down, with reference, let us say, to the bridge, or the knoll or the signs?

A. Well, it was on top of the hill, it was going downward on the knoll.

Q. Am I correct that you had just started down when you started to stop? A. Yes.

Q. Did you come to a complete stop?

A. I did.

Q. And when you came to a complete stop,

(Testimony of Mrs. Mabel Keough.)

where was this [592] light colored car ahead of you?

A. I believe it was approaching the bridge. I don't know if it was on the bridge or approaching it, I cannot remember.

Q. And what can you tell the Court as to where it was with reference to the right or left hand side of the road?

A. Well, it was on the right side of the road.

Q. Did something happen shortly thereafter?

A. Yes, it did.

Q. Will you just tell the Court what happened?

A. Well, the only thing that I can remember that is clear in my mind is I saw the Buick sway and kind of hit the bridge, and then it just swove out and hit into the barrow pit on the north side.

Q. On which side?

A. On the north side of the road.

Q. At that time that the Buick swerved and came across to the north side of the bridge, was the Pontiac on the bridge? A. Yes.

Q. And where was the Pontiac at that time with reference to its side of the road?

A. It was on its own side.

Q. On its own side of the road. Can you tell the Court anything about the speed of what you have described as the Buick automobile as it swerved across the road into the barrow pit to the [593] north? A. No, I couldn't.

Q. Well, can you tell the Court about the for-

(Testimony of Mrs. Mabel Keough.)

ward progress, or the speed of the Pontiac at that time?

A. Well, when they hit, or however they did hit, the Pontiac just stopped. It didn't proceed, I mean it just stopped.

Q. It just stopped? A. Yes.

Q. That would be—what direction would that be the Pontiac had been proceeding?

A. Going west.

Q. And it ceased going west? A. Yes.

Q. And at this time, I take it, you were at a stop? A. Yes, I was.

Q. On the knoll? A. Yes.

Q. And were you higher or lower than the bridge where the collision occurred?

A. I would be higher than the bridge.

Q. Can you—of course, the Court is pretty well familiar with this scene, but can you give him an idea of your visibility ahead, or your ability to see?

A. Well, you couldn't see the bridge until you got on top of the knoll, I mean, you wouldn't have known it was there.

Q. But then when you do get to the knoll and at the place [594] where you were stopped—

A. You can see the bridge.

Q. Were you looking up or down at the bridge from your stopped position?

A. You mean if I could see the bridge?

Q. Well, I am speaking now of the time when you had come to a stop and had passed over the knoll, as I understand it. A. Yes.

(Testimony of Mrs. Mabel Keough.)

The Court: Was the bridge down hill, or on the level with you, or up hill?

A. No, it would be going down hill.

Q. When the collision occurred and the Buick swerved into the barrow pit, what did you do then with respect to the vehicle you were driving?

A. Well, after the Buick had went down into the barrow pit, I drove up to where the Buick was, and I got out.

Q. Now, when the Buick went into the barrow pit, were there any unusual sounds that you heard?

A. Just the thud.

Q. Was there anything in the way of dust or dirt?

A. Yes, there was.

Q. Well, tell the Court what there was?

A. Well, when it hit the barrow pit, I mean there was dirt and dust flew up.

Q. Well, I believe you told me then you drove up and stopped? [595]

A. Yes.

Q. What did you do then that you recall?

A. I got out of the panel wagon, and I went around in front, and a man brought two small children up to me.

Q. Did you at any time go down into the barrow pit?

A. No, I didn't.

Q. And what did you do with respect to the two small children?

A. I got some dirty laundry out of my panel wagon—they were sheets—and I laid them down on the ground and I rolled them up so they would have

(Testimony of Mrs. Mabel Keough.)

padding for their heads, and I laid them in front of my panel wagon.

Q. Did you observe the people in the light colored car? A. No, I didn't.

Q. Well, were there some injured people that you know of?

A. Well, I heard later there was, I mean I didn't go up to the car at all.

Q. You didn't go up to the light colored car?

A. No.

Q. Did you ever find out what make the light colored car was while you were there?

A. Yes, I found out later it was a Pontiac.

Q. I take it then you didn't see the people in that Pontiac removed? A. No, I didn't.

Q. Or do you know where they were taken, if they were [596] removed? Did you see them along the highway there or on the bridge?

A. No, I didn't.

Q. How about the man that came up from the Buick, could you describe him?

A. He was a tall man, I wouldn't know how tall he was, and he was slender.

Q. And did he—was there anything about him to indicate he had been in an accident?

A. Yes, he was bleeding from the forehead.

Q. Did you observe what that man did with respect to anything that was in the car at any time?

A. Well, he threw bottles.

Q. And what sort of bottles were those?

(Testimony of Mrs. Mabel Keough.)

A. Well, I thought they were beer bottles.

Q. And could you tell me where he threw them?

A. He went up in front of the car, and he threw them kind of up on the slope of the hill.

Q. Is there a fence anywhere along there?

A. I believe there is someplace in there.

Q. I was wondering whether these bottles might have been thrown somewhere with respect to the fence?

A. Well, I don't have that clear in my mind, I mean I can't remember. I know he threw them up towards, by the fence, or some place, I remember a fence, but I can't— [597]

Q. Right after the collision when the Buick had come to a rest in the barrow pit with this dust, were there other men there that you saw?

A. Yes.

Q. How many?

A. I couldn't say, there was quite a few men there. Oh, it was a little while, but there was a lot of people around.

Q. Well, I was directing this particular question to the time immediately after the collision had occurred.

A. There was a man that got of a station wagon that was pulled opposite me, that would be on the south side of the road. He was pulled opposite me.

Q. And was there any other men there immediately? A. No.

Q. Could you describe this other man to me as to age? A. No, I couldn't.

(Testimony of Mrs. Mabel Keough.)

Q. Was he tall?

A. I remember he was short and stout. I couldn't estimate his age or anything.

Q. How about his hair, do you know if he had a hat on? A. I believe he had a hat.

Q. How long, do you know, or would you say you remained there at the scene of the accident?

A. Oh, I couldn't say, it was quite some time, but I couldn't estimate it. [598]

Q. While you were there, did any officers come, highway patrolmen, sheriffs?

A. No, I didn't see any, or they didn't talk to me.

Q. Did you—when you left the place of the accident, do you know whether persons had been taken to the hospital before you left?

A. No, I didn't.

Q. You didn't see them leave? A. No.

Q. What was your attention directed to during the time immediately after the accident?

A. It was to the two small children, I never left them.

Q. And am I correct that that is about all you gave attention to? A. Yes.

Q. Where were the children eventually taken?

A. They were taken to the hospital in Malta.

Q. And who took them? A. I did.

Q. In your—— A. Panel wagon.

Q. While you were there, do you recall the ambulance having come?

A. Well, the little nurse that rode in with me,

(Testimony of Mrs. Mabel Keough.)

she came and asked me if I would come and help her clean the blood off [599] the man that was in the Buick.

Q. And at what place was that?

A. That was in the hospital.

Q. In Malta? A. In Malta.

Q. I am referring now to the scene of the accident, whether you recall the ambulance being out there while you were there?

A. Yes, he come over and said that somebody had said that there was a woman over there that needed attention, and there was a man spoke up and said, "You don't need to bother about her, she is dead," but I don't know who he took in with him.

Q. The man who said that, was he a man that you had seen there before?

A. Yes, he was the short man with a hat on.

Q. Was that the same man that——

A. It was the same man that I thought was driving the station wagon?

Q. Do you know how many station wagons there might have been there at the east end of the bridge?

A. No, that is the only one I saw was the one that was parked opposite me.

Q. When you were requested to take the children into Malta, your panel was still on the east end of the bridge? A. Yes.

Q. How did you then proceed across the bridge, if you will tell [600] the Court that.

A. There was a man standing by the Pontiac

(Testimony of Mrs. Mabel Keough.)

and one standing on the south side of the bridge there, and they directed me through.

Q. And you drove your panel through?

A. Yes.

Q. Did you stop at the west end of the bridge before you proceeded? A. No.

Q. And you drove then from the bridge on into Malta? A. Yes, I did.

Q. When you got to Malta, will you tell the Court whether you found any other people who had been in the accident at the hospital?

A. There was a lady and a man there.

Q. And were they receiving attention there?

A. Yes, they were.

Q. Do you know what their names were, or did you learn who they were?

A. Later on I did, it was Mrs. Schoepski and Mr. O'Keefe.

Q. Did you see Mr. Schoepski at any time?

A. No.

Q. Going back to the time, Mrs. Keough, when the collision occurred and the Buick came across the road, can you tell the Court the speed of the Buick, slow or fast, or give him any [601] idea?

A. Well, I thought it was going fast, just the way, the impact of the ditch when he hit it. It just stopped and dust and dirt and stuff flew. It just stood still when it hit, but it swerved so fast in front of me.

Q. When that happened, you were back on the hill? A. Yes.

(Testimony of Mrs. Mabel Keough.)

Q. And it was later—do you know how much later it was again, how soon it was before you pulled up?

A. Well, after the Buick hit the ditch, I drove up.

Q. Immediately? A. Yes.

Mr. Alexander: You may cross-examine.

Cross-Examination

By Mr. Doepker:

Q. Mrs. Keough, the vehicle that you were driving on that morning, you say, was a panel car, was it? A. Yes.

Q. And you gave the type as a GMC, was it?

A. Yes.

Q. It would be the normal delivery type, is that correct? A. Yes, it was.

Q. And where was the seat, the driver's seat with respect to that panel, was it inside the panel also? [602] A. Yes.

Q. That is, the body of the cleaner wagon that you were driving, or the cleaner truck that you were driving, comprised this panel which was enclosed on both sides and had windows to the back and sides besides the windshield, is that right? A. Yes.

Q. It was all enclosed in one vehicle?

A. Yes, it was.

Q. And you were driving along there coming up to this sign you have described to the Court and to us here in a westerly direction, weren't you?

(Testimony of Mrs. Mabel Keough.)

A. Yes.

Q. And approaching the sign that was on the north side of the road that said something about some narrow bridges ahead, correct? A. Yes.

Q. Now, fixing your time now as you are coming up that hill, you would not be able to see the bridge, would you, until you got up to about where that sign was, or at least where the sign was, right?

A. Yes, it would be on top of the knoll.

Q. Then after you reached that sign would be the first chance that you could see down to the bridge, is that correct? A. Yes.

Q. Now, then you finally reached this point to the top of [603] that knoll, didn't you, headed west?

Q. You came up to that point? A. Yes.

Q. Now, then, at any of that time we are now talking about, from the bottom of the hill to the east, up until the time you get to the knoll, at any of that time, was there a station wagon between you and that Pontiac? A. No.

Q. And after you got to the top of the knoll of that hill, and was looking down towards the bridge, was there a station wagon between you and that bridge on that morning?

A. You mean in front of me?

Q. In front of you, yes. A. No.

Q. I believe you testified that as you came up to that knoll where you could observe the bridge, and as you were coming up to the top of it, there was some car following you that honked the horn indicating that they intended to pass?

(Testimony of Mrs. Mabel Keough.)

A. Yes

Q. That car never did pass, did it?

A. It didn't pull in in front of me.

Q. Well, that's what I mean. And the accident happened, then, while the car was coming behind you, didn't it, that station wagon was coming behind your panel job when the accident [604] happened, isn't that your memory of it?

A. No, he started to go around me. He honked his horn, and he started to go around me.

Q. Yes.

A. And I was paying attention to him and the light colored car in front of me. I don't know if he pulled back behind me or what he did, but he didn't stay in front of me.

Q. At any rate, he was honking to pass you as you got up to that knoll, didn't he?

A. He was.

Q. And as far as you were concerned, at no time, did that panel car come between you and the Pontiac, did it? A. No.

Q. So that you were the first and only car on that occasion that was directly behind that Pontiac, weren't you? A. Yes.

Q. Now, can you give the Court your best recollection of approximately when this panel truck, or this station wagon, reached a point opposite you, compared to the time of the accident?

A. You mean compared to the time that I pulled up?

(Testimony of Mrs. Mabel Keough.)

Q. No. You know when the collision took place?

A. Yes.

Q. You remember that? A. Yes. [605]

Q. At that time, you had come over the brow of the hill, had you not? A. Yes.

Q. Because you saw the Pontiac going ahead of you, didn't you? A. Yes.

Q. Now, then, with reference to that collision, when did that station wagon reach the brow of that hill to the best of your memory?

A. I just can't answer that, I don't know.

Q. Well, can you do it this way? You brought your car to a stop, didn't you? A. Yes.

Q. And before you brought your car to a stop, this station wagon apparently had honked to go past you, hadn't it? A. Yes.

Q. And then you finally pulled down after the Buick had swerved ahead of you and went into the barrow pit, you finally pulled down further, didn't you? A. Yes.

Q. And then you got out of your car, didn't you? A. Yes.

Q. And as you got out of your car, where was the man in the station wagon, what was he doing, the man in the station wagon? [606]

A. The station wagon was pulled on the opposite side of the road.

Q. He was not on the north side of the road, was he?

A. No, he was on the south side of the road.

(Testimony of Mrs. Mabel Keough.)

Q. He was on the south side of the road, and did you get out first, or did you and he get out about the same time of your respective vehicles, this little short heavy set fellow?

A. I can't recall, I really can't recall if he was out first or not.

Q. But you didn't get out until after you had stopped kind of at the top of the hill, and then after the Buick went into the barrow pit, you pulled up——

A. Yes.

Q. Until that time you didn't get out of your car, did you?

A. No.

Q. And the station wagon pulled up aside of where you last stopped, where you finally pulled up opposite the Buick?

A. Yes.

Q. And that is where the station wagon came up, wasn't it?

A. Yes, but I can't say if it was there before I pulled up or not, I mean I cannot remember.

Q. You don't remember that detail, is that right?

A. No.

Q. But you do know as you were coming to that knoll and to the top of that hill that he was honking his horn to pass you, [607] don't you?

A. Yes.

Q. It was not until you got to the top of the hill that you saw the cars down in there by the collision, was it?

A. No.

Q. You had to be on the knoll before you could see down there, didn't you?

A. Yes.

(Testimony of Mrs. Mabel Keough.)

Q. I show you a photograph that is numbered, it has a number on the photograph, No. 3. I believe it is one of a series of photographs which comprise Plaintiffs' Exhibit No. 4. Now, do you recognize that scene, Mrs. Keough? A. I do.

Q. And what is it that you see there?

A. It is a Pontiac.

Q. And is that the position that you recall that Pontiac to be in from the place that you were up on the knoll of the hill?

A. No, before the accident happened, no.

Q. Before the accident happened, it was proceeding in that direction? A. Yes.

Q. But that was the position after the accident, at least, wasn't it?

A. Yes, as I remember it. [608]

Q. As you remember it. Now, would that also be true looking at this Pontiac as shown by Picture No. 4 of Plaintiffs' Exhibit 4, looking easterly?

A. Well, I never did see it looking this way, I mean this would be the way that I went by it. I never went up to it.

Q. You never got out of your car and went back to look at it to get that view, is that right?

A. No, I did not.

Q. But you did go by the Pontiac. I presume that when you went by, that fender wasn't laying in the highway? A. No, it wasn't.

Q. But there was a man that stood, as you say, on the left side of the Pontiac, and a man at the bridge that guided you through, is that right?

(Testimony of Mrs. Mabel Keough.)

A. Yes.

Q. And you were the first one through, weren't you?

A. I believe I was.

Q. You were the first one that went through after that accident?

A. Yes.

Q. I call your attention to Photograph No. 7 and I ask you to state whether or not the sign at the right-hand side there is the sign to which you refer as being at the top of the knoll?

A. Yes. [609]

Q. Now, further please, can you tell the Court with respect to Photograph No. 12 of Plaintiff's Exhibit 4 where it was that you pulled up your panel delivery truck and stopped?

A. I was stopped in here (indicating).

Q. You are now indicating that you stopped at approximately the point where there is a wrecker stationed on the north side of the road, is that right?

A. That was my last stop, right by the Buick here.

Q. Yes, all right. And the position of your car then would be approximately like the place that the wrecker is in that photograph, only you are headed west, aren't you?

A. Yes.

Q. And that would be with reference to the Buick in the ditch, is that right?

A. Yes.

Q. Now, as I understand it, across the road on the south side, as you got out of your panel, that

(Testimony of Mrs. Mabel Keough.)

station wagon had pulled up on the opposite side, is that right?

A. Yes, he was over in here (indicating).

Q. And you don't remember just exactly when it was that he arrived there? A. No.

Q. Whether he arrived at the same time or not?

A. No.

Q. But you do know he honked to go around you before you got [610] to the top of the hill?

A. Yes.

Q. Is that right, and to where you could see down to the bridge?

A. Well, it was on top of the knoll of the hill when he was honking to go around me.

Q. He hadn't gone around you yet at the top of that knoll, had he? A. No.

Q. Now, as I recall now, your testimony to the Court thus far, you saw the collision, didn't you, you saw the cars come together? A. Yes.

Q. But you wouldn't be in a position to say whether they were—with reference to the different sides of the bridge just where they did come together, would you? A. No.

Q. And you also say that after the Buick went down into the barrow pit that you brought your car up there and came to a stop and then with reference to that time, when was it that a man came up there with two children?

A. After I got out and walked around in front of the panel wagon, he was bringing the two children up to me, and he gave them to me.

(Testimony of Mrs. Mabel Keough.)

Q. You since know who that man was, don't you? [611]

A. Yes.

Q. And that was Mr. O'Keefe, wasn't it?

A. Yes.

Q. In what manner did Mr. O'Keefe bring those children up from the Buick?

A. I don't know which one it was, but he had one by the hand, and the other one was coming by itself, but I don't recall whether it was the boy or the girl.

Q. All right, now, then, as Mr. O'Keefe came up from the Buick and brought the children up there, up until that time, nobody else had been down to the Buick, had they, that you recall? A. No.

Q. At any rate, there was nobody else bringing any children up?

A. No, it was the man I later heard was Mr. O'Keefe.

Q. And then after Mr. O'Keefe brought those children up and you placed them there by the side of your panel truck, did they ever go back to the car, the children? A. No.

Q. And they stayed with you the entire time from the time they were brought up, is that correct?

A. Yes.

Q. And then you brought those children into the hospital, didn't you? [612] A. Yes.

Q. And between the time that Mr. O'Keefe brought them up to you, and the time you brought them to the hospital, they didn't go back down to the Buick, did they? A. No.

(Testimony of Mrs. Mabel Keough.)

Q. And no other man brought them up once or twice besides Mr. O'Keefe? A. No.

Mr. Doepker: That is all, your Honor.

Redirect Examination

By Mr. Alexander:

Q. I am not too clear, Mrs. Keough, as to where you were on the highway when the station wagon went past you. This photograph which Mr. Doepker showed to you, and which is Photograph No. 7, how far along that scene would you have been, approximately, when the station wagon went to pass, can you point that out to the Court?

A. I believe it was after I had went by the sign, but like I say, I don't know for sure. I believe it was after I went by the sign, I believe it was past the sign and he come up behind me and he honked his horn, and he pulled around and went by, but he didn't pull in front of me.

Q. You do know he pulled up at least alongside of you?

A. Yes, he came out this way (indicating), but he did not [613] go into my lane.

Q. Now, can you tell me where he went when he pulled up alongside of you? A. No.

Q. You don't know whether he proceeded down on the left hand side of the road, or——

A. No, I don't know.

Q. Can you tell the Court how long that station wagon remained down at the—I think you told Mr.

(Testimony of Mrs. Mabel Keough.)

Doepker down at the left hand side at the end of the bridge?

A. I believe it was there when I left with the children.

Q. You think it was there when you left?

A. Yes.

Q. Close to the bridge?

A. Well, it was opposite me, I don't know how far, I can't tell you how many feet it was from the bridge, but it was across from me on the other side of the bridge.

Q. Now, the place where you braked down and ultimately came to the first stop, could you tell the Court approximately where on that picture that would have taken place?

A. Well, it was after the sign, I can tell you that, but otherwise I can't.

Q. Well, can you tell the Court how far it would have been from the bridge? A. No. [614]

Q. Can you tell the Court how far you pulled up to the Buick?

A. No, I couldn't, I won't estimate that.

Q. Well, was it some——

A. I could see the bridge, I can tell you that. I could see the bridge, but I won't estimate how far it was.

Q. Well, it was far enough that you felt you ought to drive some—— A. Oh, yes.

Q. You didn't get out of your car and go to the accident, you had to drive and did drive to the accident? A. Yes.

(Testimony of Mrs. Mabel Keough.)

Q. Mr. Doepker also showed you this photograph, No. 3 of Plaintiffs' Exhibit 4, I believe it is, do you know how the Pontiac got in the position shown in that photograph?

A. Well, what do you mean?

Q. Well, just before the accident, was the Pontiac facing and pointing in that direction?

A. No, it was going straight.

Q. It was going straight? A. Yes.

Q. Now, do you know how the front end got turned at the angle shown in the photograph?

A. No.

Q. It wasn't going that way ahead of you? [615]

A. No, as far as I could see, it was on its own side of the road.

Q. And continuing straight ahead?

A. Yes.

Q. Are you sure that no car went across that bridge before you went across?

A. No, I said I wasn't sure, but I thought that I was the first one to go across.

Q. Now, the man who was driving the station wagon, can you tell the Court where he went immediately after he came to a stop?

A. No, I cannot recall.

Q. Or what he did? A. No.

Q. Did you see him leave the scene of the accident at all? A. No.

Mr. Alexander: I think that is all.

Mr. Doepker: There is one thing I forgot to ask her about, may I?

The Court: Very well.

(Testimony of Mrs. Mabel Keough.)

Recross Examination

By Mr. Doepker:

Q. With respect to these bottles that you said were thrown out, that was Mr. O'Keefe that was throwing the bottles out? [616] A. Yes.

Q. Was he throwing them out from the ground or from the Buick, or do you remember?

A. He had some in his hands, I don't know where he got them.

Q. I see. A. He had them in his hands.

Q. And that was after he had brought the children up to you? A. Yes.

Q. Now, did Mr. O'Keefe talk to anybody there at that time, right approximately at that time, was he speaking to anybody?

A. What do you mean?

Q. Did he talk to anybody there at the Buick?

A. He was on the right hand side of the car, and he said to his wife, he says, "How are you," he says, "We will have you out of here in a little while."

Q. And that was right immediately after you had the children, is that right?

A. Well, I don't know if it was after he threw the bottles or before, but I remember him saying that.

Mr. Doepker: I had overlooked asking her about that.

The Court: Is that all?

Mr. Doepker: I believe it is, your Honor.

Mr. Alexander: That is all.

The Court: Step down.

(Witness excused.) [617]

Mr. Doepker: May Mrs. Keough be excused?

Mr. Alexander: Are you going to have some rebuttal?

Mr. Doepker: Very short, we have one witness, very short.

Mr. Alexander: With reference to the testimony of Mrs. Keough?

Mr. Doepker: Well, it is with reference to the position of the cars, yes.

Mr. Angland: Well that would be a violation of the ruling of the Court, as I recall it.

The Court: Yes, I thought all the rebuttal and everything was in except for the testimony of this witness and any rebuttal that was necessary as a result of her testimony. Is that it?

Mr. Doepker: That is what this is, your Honor.

The Court: Very well, call the witness.

Mr. Alexander: For that reason I don't want Mrs. Keough to be excused until we get through with him.

The Court: Very well. [618]

PLAINTIFFS' REBUTTAL

RAYMOND O'KEEFE

Direct Examination

My name is Raymond O'Keefe: I have previously been sworn in this case and following the collision

(Testimony of Raymond O'Keefe.)

and the Buick car going into the barrow pit, the farthest I got away from the Buick car on that occasion was to the Pontiac, that is where the Pontiac is shown in the picture, that's the farthest I went. I was removed from the scene from the east end of the bridge when the ambulance got there and the ambulance removed me and Mr. Schoepski. During the time that I have just related, there was no car on that highway that pulled up within 10 or 12 feet of the Buick. The car that pulled up closest there was a station wagon, it would not be within 10 feet because the children were back 10 feet east of the bridge. I never got out of the front door when I got out of the Buick and nobody besides me ever took any of the children out of my car. At the time that the children were removed, I didn't see them being moved. I went away first. At no time did the children return to the Buick car and climb back in.

With respect to the situation there and the children climbing back in the car, the car was over what they call the barrow pit, the rear wheels was on the bank where I got out; I had to step way down to the bottom of this hole. I took the little girl out and the little boy out the left rear door. They couldn't possibly climb back in. I didn't get out of the right hand front door of the Buick while I was in the vicinity and before I was taken to the hospital. I went back and took a purse out of the Buick and a watch and I wasn't throwing bottles around there at the time or at any time after the accident.

(Testimony of Raymond O'Keefe.)

Cross-Examination on Rebuttal

I was thrown through either the windshield or the glass in the left door; I was thrown into the glass. I was thrown forward and I was pretty much shaken up, but my memory is clear. As to whether my memory was perfectly clear and I was in full command of my faculties right after the accident, well, I got out and took the youngsters out and I weren't dazed right then. As to how deep it was from the floor of the Buick down to the ground in the barrow pit, I wouldn't know. I would have to put the car back and measure it. I would put it at three feet, 30 inches, anyway, because I had to reach down quite a ways. I expect that little Michael could climb 30 inches without trouble, but I don't think he could climb back in the car, there was nothing to get a hold of.

A. Well, I expect he could.

Q. So, it wasn't impossible for him to climb back in?

A. No—I don't think he could, there was nothing to get a hold of.

Mr. Alexander: That is all.

PLAINTIFFS' REBUTTAL

WILLIAM C. DOVE

recalled on behalf of Plaintiffs as a witness, having been sworn testified as follows:

Direct Examination

I have been previously sworn and testified in this case and I testified on the previous hearing. I am the sheriff of Phillips County and have been sheriff and undersheriff for a number of years and I have already described the investigation that I made of the conditions on the bridge following this accident. I came up there soon after the accident happened.

Q. And I wanted to ask you with reference to the conditions that you described on the bridge of the debris and the markings below the cars, where with reference to those were the first scrapings that is shown on the bridge?

Mr. Angland: Just a moment.

Mr. Alexander: Just a minute, to which we object, your Honor, on the ground and for the reason that it is not proper rebuttal and clearly violates our understanding of the Court's order.

The Court: Yes, I don't see what this has to do with this witness' testimony.

Mr. Doepker: Where did the accident happen if the Pontiac started in on its own lane?

The Court: She didn't testify to where the accident happened did she?

Mr. Doepker: I don't think she fixed it.

(Testimony of William C. Dove.)

Mr. Alexander: She said nothing about the debris, certainly.

The Court: Or any markings.

Mr. Doepker: The question is——

The Court: This witness has already testified with reference to that.

Mr. Doepker: I don't think he has testified to the position of these markings compared to where the debris was under the car.

The Court: Well, yes, the record is full of a lot of testimony with reference to that.

Mr. Doepker: Well, there is no jury here, and we wanted to show that this witness would testify, or offer to show that this witness would testify that the scrapings of red on the south rail of the bridge started west of this point where the cars apparently collided. That is the purpose of this testimony.

Mr. Angland: Well, that is a clear violation of the ruling, and leaves us without other witnesses who were there your Honor.

Mr. Doepker: What witnesses were there that knows anything about it.

The Court: The witnesses that made any measurement at all. All the testimony with reference to markings on the bridge and markings on the road, and the point where the car finally came to rest with reference to those markings, that testimony is all in, and it has nothing to do with this witness' testimony.

Mr. Doepker: Okay, your Honor.

The Court: Now, I am sure that the testimony is

(Testimony of William C. Dove.)

in with reference to where the red marks were on the bridge. I don't recall it specifically to mind right now, but it is in there, and it has nothing, at any rate, to do with this witness' testimony. I don't see that it is any rebuttal to anything that she has said. How does it rebut what she has said?

Mr. Doepker: She didn't bring it up to the point of the accident so I guess it doesn't then, I think that is the situation.

Mr. Doepker: Now here is one other thing, your Honor, we would like to offer, and that is concerning the road immediately east of the bridge. I want to ask you whether there was on this occasion in August, 1955, a contour or a condition of the highway that affected cars driving from the top of the knoll to the bridge westerly?

Mr. Alexander: Just a minute, to which we object on the ground and for the reason that it is improper rebuttal, that in all events it would call for a conclusion of the witness, it would be incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Doepker: Your Honor, we would like to offer this testimony and make an offer of proof here that on the date of this accident that this witness, Mr. Dove, knows from his own experience with driving down from the knoll of that hill to the bridge and upon the bridge that there was a contour or condition in the highway immediately to the east of the bridge, which would cause cars to follow the contour over to the south of the center of the bridge.

The Court: Well, your offer is denied for a great number of reasons. If it was admissible, it would have been admissible upon your case in chief, and no foundation has been laid for the testimony of the witness for the purpose for which you offer it, so the offer is denied. I don't care to hear any more argument about it.

Mr. Doepker: I am not going to argue it, if it is a question of foundation——

The Court: It is improper rebuttal, it is part of your case in chief.

Mr. Doepker: That is all, your Honor.

Thereafter the Court made its findings of fact and conclusions of law and ordered judgment entered for defendant and cross-complainant, Walter Schoepski, and against the plaintiffs herein.

Respondent submit and file the above and foregoing as a true, full, correct and complete narrative summary statement of all of the testimony offered or received and all the proceedings had in the trial court at and in connection with the trial of said cause as the same relates to or is involved in or as in any manner affects the issues presented and to be presented for use upon its appeal taken to the United States Court of Appeals for the Ninth Circuit.

Dated this 9th day of July, 1958.

STEPHEN GRANAT,
DONALD D. COLE,
GRANAT & COLE,

M. J. DOEPKER,
M. F. HENNESSEY,
DOEPKER & HENNESSEY,

By /s/ M. J. DOEPKER,
Attorneys for Plaintiffs.

Service of the foregoing condensed narrative statement of the proceedings and testimony in the trial court as is claimed by plaintiffs and appellants relates to or is involved in or as in any manner affects the issues presented and to be presented for use upon its appeal taken to the United States Court of Appeals for the Ninth Circuit and receipt of a copy thereof is hereby admitted and acknowledged with all rights and reservations of defendant and respondent preserved and without waiver of any and all of defendant and respondent's rights in the premises, this 10th day of July, 1958.

H. C. HALL,
EDWARD C. ALEXANDER,
JOHN H. KUENNING,
HALL, ALEXANDER &
KUENNING,

By /s/ JOHN C. HALL,

EMMET C. ANGLAND,
JOSEPH MARRA,
ANGLAND & MARRA,

By /s/ EMMET C. ANGLAND,
Attorneys for Defendant.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Montana—ss.

I, Dean O. Wood, Clerk of the United States District Court for the District of Montana, do hereby certify that the following papers and documents are the originals filed in Civil Actions Numbered:

1798, Stephen Granat, as Administrator of the Estate of Mary A. O'Keefe, Deceased, Plaintiff, versus Walter Schoepski, Defendant.

1799, Stephen Granat, as Administrator of the Estate of Mary A. O'Keefe, Deceased, Plaintiff, versus Walter Schoepski, Defendant.

1800, Raymond O'Keefe, Plaintiff, versus Walter Schoepski, Defendant.

said papers and documents being:

Complaint (contained in Judgment Roll).

Petition for removal and jurisdictional statement on removal without duplication of complaint (contained in Judgment Roll).

Answer with counterclaim (contained in Judgment Roll).

Reply (contained in Judgment Roll).

Court's Findings of Fact and Conclusions of Law, (contained in Judgment Roll).

Direction for entry of Judgment (included in Court's Findings of Fact and Conclusions of Law, contained in Judgment Roll).

Judgment (contained in Judgment Roll).

Plaintiffs' Proposed Findings of Fact and Conclusions of Law.

Defendant's Proposed Findings of Fact and Conclusions of Law.

Plaintiffs' Motion for Amendment of Findings and for Making Additional Findings of Fact and Conclusions of Law.

Plaintiffs' Notice of Motion to Amend Findings and a Motion for New Trial.

Plaintiffs' Motion for a New Trial.

Affidavits disclosing newly discovered evidence in support of motion for New Trial.

Court's Decision and Ruling on Motion to Amend Findings and make additional Findings of Fact and Conclusions of Law and Ruling and Decision on Motion for a New Trial.

Notice of Appeal.

Bond on Appeal.

Order granting additional time to file designation of Contents of Record on Appeal.

Appellants' Amended Statement of Points.

Appellants' Narrative Statement of Proceedings and Testimony.

Transcript of Evidence (Court Reporter's) Vols. I, II and III.

Deposition of Raymond O'Keefe.

Minutes of the Court, entered on October 25,

26, 27 and 29, 1956, and on January 14, 1957.
Satisfaction of Judgment.

Notice to Require Testimony to be Stated in
Question and Answer Form.

Rseponse to Defendant's and Appellee's Re-
quirement That certain testimony be stated in
Question and Answer Form.

Appellee's Record of Testimony to be stated
in Question and Answer Form.

Appellant's Designation of Contents of Record
on Appeal.

Appellee's Designation of Additional Portions
of Record to be included in Record on Ap-
peal.

I further certify that the following exhibits,
designated by the Appellant, are transmitted with
this certificate, as part of the Record on Appeal:

Plaintiffs' Exhibit No. 4, composed of 15 photo-
graphs.

Plaintiffs' Exhibit No. 5, a legend of the 15
photographs composing Plaintiffs' Exhibit
No. 4.

Plaintiffs' Exhibit No. 6, a photograph.

Plaintiffs' Exhibit No. 7, a photograph.

Plaintiffs' Exhibits Nos. 8, 9, 10, 17, 18, 19, 20,
21, 22, 23, 24, 25 and 26, being stereoscopic
pictures.

Plaintiffs' Exhibits Nos. 11, 12, 13, 14, 15 and
16, being 6 photographs.

Plaintiffs' Exhibit No. 34, a plat.

and that they are the original exhibits introduced in evidence at the trial of the above-entitled causes.

Witness my hand and the seal of said Court at Great Falls, Montana, this 28th day of July, A. D. 1958.

[Seal]

DEAN O. WOOD,
Clerk as Aforesaid.

By /s/ C. G. KEGEL,
Deputy Clerk.

[Endorsed]: No. 16125. United States Court of Appeals for the Ninth Circuit. Stephen Granat, as Administrator of the Estate of Mary A. O'Keefe, Deceased, Appellant, vs. Walter Schoepski, Appellee. Transcript of Record. Appeal From the United States District Court for the District of Montana.

Filed and Docketed: August 4, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
in and for the Ninth Circuit

Case No. 16125

District Court No. 1798

STEPHEN GRANAT, as Administrator of the
Estate of Mary A. O'Keefe, Deceased,

Plaintiff,

vs.

WALTER SCHOEPSKI,

Defendant.

District Court No. 1799

STEPHEN GRANAT, as Administrator of the
Estate of Mary A. O'Keefe, Deceased,

Plaintiff,

vs.

WALTER SCHOEPSKI,

Defendant.

District Court No. 1800

RAYMOND O'KEEFE,

Plaintiff,

vs.

WALTER SCHOEPSKI,

Defendant.

STATEMENT OF POINTS

To the Honorable Chief Justice and the Associate
Justices of the United States Court of Appeals
for the Ninth Circuit:

Now comes the plaintiffs and appellants in each of the above-entitled causes and presents the following Statement of Points upon the appeal in each of the above-entitled causes which are consolidated and which bear the number 16125.

Plaintiffs-Appellants herewith present the points upon which they claim the District Court erred:

1. That the Court committed reversible and prejudicial error in its rulings, comments and decisions in the course of the examination of the highway patrolman, Douglas Hardesty, respecting the point of collision of the vehicles on the bridge.

R. Page 69 et seq. to 75—88 to 91.

2. That the Court committed reversible and prejudicial error in refusing to permit the rebuttal testimony of Sheriff William C. Dove respecting a condition of the road east of the bridge which caused motorists to be pulled over the center of the bridge when driving from the east westerly on said highway.

R. Page 136—138.

3. The Court erred in finding as a fact the matters stated in Findings of Fact number II.

4. The Court erred in finding as a fact the matters stated in Finding of Fact number III to the effect that the defendant and cross complainant was operating his automobile on said bridge at the time of the collision aforesaid in a careful and prudent manner and on his own side of the road; that the

said Mary A. O'Keefe, in operating her automobile upon said bridge, negligently crossed over the center line and her said automobile collided with the automobile owned and driven by the defendant and cross complainant; that the proximate cause of said collision was the negligence of said Mary A. O'Keefe in crossing over the center line of said highway and into the lane of travel of said defendant and cross complainant.

5. The Court erred in finding as a fact the matters stated in Finding of Fact number V to the effect that all of said injuries were proximately caused by the negligence of said Mary A. O'Keefe, and resulted in damage to defendant and cross complainant in the sum of thirty-five thousand (\$35,000) Dollars.

6. The Court erred in its Conclusion of law number III.

7. The Court erred in its Conclusion of law number IV.

8. The Court erred in its Conclusion of law number V.

9. The Court erred in refusing to grant plaintiffs' motions for amendment of Findings of Fact and Conclusions of Law.

10. The Court erred in refusing to grant plaintiffs' motions for new trial.

11. The Court erred in giving judgment for defendant in Cause number 1798.

12. The Court erred in giving judgment for defendant in Cause number 1799.

13. The Court erred in giving judgment for defendant in Cause number 1800.

The Court's decisions were clearly erroneous because they were given and made contrary to undisputed physical facts of the case.

STEPHEN GRANAT,
DONALD D. COLE,
GRANAT & COLE;
M. J. DOEPKER,
M. F. HENNESSEY,
DOEPKER & HENNESSEY;

By /s/ STEPHEN GRANAT,
Attorneys for Plaintiffs
and Appellants.

[Endorsed]: Filed September 22, 1958.



United States
Court of Appeals
For the Ninth Circuit

STEPHEN GRANAT, as Administrator of the
Estate of Mary A. O'Keefe, Deceased,
Appellant,

vs.

WALTER SCHOEPSKI,
Appellee.

BRIEF OF APPELLANT

Upon appeal from the District Court of the United States
for the District of Montana.

DOEPKER & HENNESSEY,
Medical Arts Bldg.
Butte, Montana;

GRANAT & COLE,
Malta, Montana,

Attorneys for Plaintiffs and Appellants.

FILED

MAR 25 1959

PAUL P. O'BRIEN, CLERK



No. 16125

United States
Court of Appeals
For the Ninth Circuit

STEPHEN GRANAT, as Administrator of the
Estate of Mary A. O'Keefe, Deceased,
Appellant,

vs.

WALTER SCHOEPSKI,
Appellee.

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No. 16125

United States
Court of Appeals
For the Ninth Circuit

STEPHEN GRANAT, as Administrator of the
Estate of Mary A. O'Keefe, Deceased,
Appellant,
vs.
WALTER SCHOEPSKI,
Appellee.

BRIEF OF APPELLANT

Upon appeal from the District Court of the United States
for the District of Montana.

APPELLANTS' BRIEF

This appeal is taken from a judgment in favor of the appellee, Walter Schoepski, in three cases, two of which were brought by Stephen Granat, as administrator of the Estate of Mary A. O'Keefe, in the capacity of trustee for the heirs and in the capacity of suing for the injuries and damages sustained by Mary O'Keefe and for her conscious suffering after an action is claimed to have survived to her and was prosecuted by Stephen Granat, as her personal representative under the provisions of the laws of the State of Montana.

There is no question in this appeal relating to any matter except the finding by the Court that Mary O'Keefe was responsible for the collision, and all other matters contended for in this appeal are derivative from the claim on the part of appellant that this finding, which was made by the Court, is completely contrary to the physical facts of the case and that it could not be established by any competent evidence that said deceased, Mary O'Keefe, was driving on the wrong side of the bridge.

The matter arises because of a collision between a Buick car driven by Mary O'Keefe, who was a Canadian citizen, and a car driven by Walter Schoepski, who was a citizen of the State of Wisconsin at the time of the casualty in question and also at the time that the case was filed, so that the jurisdiction of the Court is established by the diversity of the citizenship of the individuals who are respectively plaintiff by personal representative and defendant in his own proper person. The statutory provisions believed to sustain the jurisdictions are, the statutory provision appearing 28 U. S. C. A. Section 1332, the jurisdiction of this Court follows the statutory provision allowing appeals 28 U. S. C. A. Section 1291, the pleading showing the jurisdiction of the Court appears on page 3, 4 and 5 of the record, the Notice of Appeal to this Court appearing on page 60 of the record and the bond on appeal appearing on page 61 of the record.

STATEMENT OF THE CASE

On the morning of August 30th, 1955, Mary O'Keefe was driving her Buick automobile easterly along U. S. Highway No. 2 in Phillips County, Montana, approxi-

mately 12 miles easterly of the city of Malta, Montana, upon a hard surfaced highway approximately 22 feet wide, with a black top surfacing and shoulders running along the black top. The defendant, Walter Schoepski, was driving a Pontiac automobile westerly towards the city of Malta, and the two cars came together on a bridge, the width of which, for the entire length of the bridge, was approximately 19 feet wide. The two automobiles were approximately six (6) feet wide each. The cars collided approximately one-third of the distance of the bridge from the easterly end thereof, and in the collision Mary A. O'Keefe sustained injuries from which she died, and Walter Schoepski received permanent bodily injuries.

The Pontiac automobile remained on the bridge as it came to a stop after the collision. The Buick automobile was proceeding on and along the southerly half of the highway in an easterly direction, and markings on the bridge indicate, as is contended for by appellant, that the Buick automobile was driving parallel to the bridge from the time that the automobile entered the bridge until the collision, and in the collision, which was almost a head-on collision, the cars were considerably damaged and the Buick automobile continued on after the collision gouging and scraping the bridge timbers and then traveling in an arc over the easterly end of the bridge and down into the borrow pit that existed at the easterly end of the bridge.

The material physical facts that demonstrate that the decision of the Judge was clearly erroneous on the facts and the evidence will be presented in detail for the consideration of this Court, and the evidences of the collision, with the exception of very slight changes upon the ground,

were left in the position so that the officers who investigated the accident had an opportunity to observe the physical facts regarding the collision itself, which appellant contends demonstrates that the Pontiac automobile crossed over from the north to the south lane of traffic and collided with the Buick automobile in its own lane of traffic.

All of the points that have been urged in our transcript on appeal arise because of the finding of the Court to the effect that Mary A. O'Keefe was on the wrong side of the bridge and was responsible for the collision. It will be abundantly shown by our Brief and reference to the evidence in the Exhibits that from the standpoint of physical facts that this finding is absolutely and entirely impossible of being correct because, as will be shown in our argument, if Mary O'Keefe was on the north half of the bridge and was responsible for the collision, the evidences would most certainly be there in abundance. Therefore, we will start out in our statement of the case with a reference to the Exhibits.

At the outset, we advise the Court that a series of photographs taken upon the day in question, while the Pontiac automobile was still on the bridge and while the Buick was in the borrow pit, having passed on through and swerved over to the left after the collision, the photographs so taken were marked on the negative from one (1) on through fifteen (15) inclusive. So there won't be any confusion in the mind of the Court, the photographs which have the numerals shown as having been on the negative before the picture was printed will all refer to plaintiffs' exhibit 4, subdivision 1 through 15, and without reference to the Exhibit 4 in each instance, we will simply, for the

purpose of these photographs that we are considering, mention them as the numerals appearing in plaintiffs' exhibit 4 which will be explained in the appendix to this Brief.

Photos number 7 and 8, for the purpose of starting this statement of the case, show the highway involved and the place of the collision from two different positions. One, looking west, which is photograph number 7 of plaintiffs' exhibit 4, and photograph 8 is the same highway looking east. These two photographs show the scene of the accident, and it will be observed by photograph number 7 that a driver traveling westward as Mr. Schoepski was in this case and never having been over the roadway will be unable to see the bridge in question until he reaches the narrow bridge sign which appears on the right of photograph number 7. The bridge in question is down below the top of the knoll that appears in this picture, but a driver must pass this narrow bridge sign before he will be able to see the bridge where the casualty occurred.

On the contrary, on picture number 8 this is the view as a motorist is traveling east and the entire bridge is visible from this position, and both of these photographs were taken approximately 500 feet away from the bridge where the casualty happened, but it is abundantly shown by photograph number 8 that the highway, as it proceeds towards the bridge, goes toward the bridge in a gradual manner and that the width of the traveled portion of the bridge is the same as the width of the black top on the highway. These two photographs will show the scene of the collision and the points that will be referred to from time to time when we reach the argument in this Brief.

Photographs 9 and 10 of plaintiffs' exhibit 4 will show the bridge looking north and south. Photograph number 9 is taken directly from the south side of the bridge and the bridge timbers appearing closer in the picture are the ones upon which the markings of the red Buick and the splintering of the sleeper and the uprights and the bridge timbers are shown in other photographs. Photograph 9 of plaintiffs' exhibit 4, the camera is looking north and photograph number 10 the camera is looking south, but likewise shows the north railing of the bridge nearest in the photograph.

Photograph number 2 of plaintiffs' exhibit 4 shows the Buick involved in the accident, which was driven by Mary A. O'Keefe, in the borrow pit in the position that it went around the eastern end of the bridge after the collision, and in the foreground of the photograph, near the northeast corner of the bridge, appears some debris which will be referred to later in our argument and appear in the testimony of one of the witnesses for the plaintiff. The wrecker appearing on the right edge of the picture was, at the time the photograph was taken immediately following the collision and as soon as the wrecker could get through the bridge after the Pontiac was moved sufficiently to enable the wrecker to get there. The wrecker is seen engaged in the task of prying open the door of the Buick so that the body of Mary A. O. Keefe, behind the driver's seat, could be removed and gotten out of the Buick.

Photographs 3, 4 and 11 show the Pontiac on the bridge after the collision and the position of the Pontiac will be observed in picture number 3 in connection with a smudge

on the top railing of the bridge so that the matter is now directed to the attention of the Court to show the position of the Pontiac after the collision and the evidence will show when this photograph was taken that it was a short time after the collision with the automobiles looking west that are unable to get through the bridge and the smudge upon the top rail of the bridge, the evidence will show, occurred in the collision when the rear end of the Pontiac automobile was thrown upwards and over against the bridge rail in the collision, and this photograph also shows the crease in the top of the Pontiac which was made in the collision and to which reference will be made. This photograph also shows a part of the fender of the Pontiac which had been removed before this picture was taken so that a laundry panel carrying the injured could get through, and then the fender was replaced, as some of the evidence will show, in the same position that it was after it had been apparently stripped loose as the Buick went through in this area. Photograph number 3 also shows the scraping in this area which was made by the Buick as it went along the south rail of the bridge, and the gouging of the bridge timbers that occurred in the collision to which reference will be made in our argument in this Brief.

Photograph number 4 shows the picture taken of the Pontiac automobile looking eastwardly and showing the liquid that had run out of a part of the Pontiac automobile as it drained towards the west and towards the north. The smudge on the top rail is shown off to the back of the Pontiac and the evidence will show that this is the only marking that occurred on the north rail of the bridge in this accident. On the opposite side of picture number 4,

the scrapings along the south rail, made by the Buick automobile can be seen and will be referred to in our argument. This picture was taken after the wrecker had gotten on the opposite side of the bridge and was engaged in extricating Mary A. O'Keefe from the Buick automobile in the borrow pit which can be seen imperfectly through the north rails of the bridge. The gradual rise from the bridge to the east also can be observed in this picture number 4.

Picture number 11 shows the wrecker lining up in position to get the Pontiac pulled off the bridge so that the traffic on each side of the bridge could pass through, and the position of the Pontiac and the angle in which it appears will demonstrate the position that the Pontiac automobile got into after the collision, and later in the argument the position of this car and the relative position between it and the markings on the bridge and a gouge mark in the south lane of travel will be referred to in the testimony of the highway patrolman who was on the scene very soon after the accident and before the automobiles had been removed and while the traffic was still backed up on each side of the bridge from which he determined, in his opinion, where the point of collision occurred.

Photograph number 5 shows a close-up of the Pontiac automobile and a wrecker that appears in the picture to the left, immediately ahead of which is an ambulance and then from there on eastward, trucks and automobiles that were standing along the highway because of being blocked by the Pontiac still on the bridge. On the right hand side of picture number 5 is shown the gouging of the bridge timber at the base and the bridge timbers on the south

rail of the bridge. This picture also shows the gradual incline to the east where the position of automobiles beyond the rise in the road may be observed in this photograph. The position of the wrecker in picture number 5 was referred to in the testimony of one of the witnesses, Pat West, indicating the position which he claimed that he was in following the collision, claiming that he had followed the Pontiac down to that point. The Court will examine also the testimony of Mabel Keough who testified that she was the one that was following the Pontiac automobile and that it was her automobile that was in the position where this wrecker is shown in picture number 5 of exhibit 4, and that it was at this point that her laundry panel was stopped after she observed the wreck from the brow of the hill and immediately proceeded down to this point and took care of the two O'Keefe children until they could be removed to the hospital. The conflict between the testimony of Pat West and this witness will be referred to in our argument in support of our contention in this case.

Photograph number 6 of plaintiffs' exhibit 4 is taken from the south east of the bridge and shows a wrecker, the ambulance, a cattle truck to the east of the bridge, the Pontiac on the bridge, the other vehicles, one of which is shown with the flasher light to the top which is on the west side of the bridge, and the line of traffic that is backed up from the bridge westerly being unable to get through because the Pontiac shown was blocking the traffic so the traffic could not get through, and this also will be referred to in connection with the testimony of Pat West, who claimed that he drove a Ford station wagon

through the bridge, the first one to cross after the accident, and this also will be referred to in our argument.

Photograph number 12 of plaintiffs' exhibit 4 shows the bridge timbers, the places where it was gouged out by the Buick, a scuff mark which is referred to in the testimony of the highway patrolman and a gouge mark which is referred to in the testimony of the highway patrolman, and also the position of the wrecker which is shown relative to the place that the Buick automobile wound up in the borrow pit with the debris shown at the north easterly edge of the bridge and the hill immediately to the east of the bridge, this picture is taken looking to the east after the Pontiac had been removed from the bridge, and most of the traffic had passed on through after the accident. The wreckers are engaged in the prying of the Buick apart so that the body of Mary A. O'Keefe could be removed. After the body had been removed and the body taken into the funeral parlors in Malta which are about 11 or 12 miles westerly from this bridge in the town of Malta, Montana.

Photograph number 1 is a close-up of the Buick taken while the Buick was in the borrow pit showing the manner in which the left side of the Buick automobile was crushed in and showing the body of Mary A. O'Keefe still in the front seat of the Buick automobile after the collision, and the damage to the Buick automobile on the front left side, while the Buick was in the borrow pit immediately to the east and in the borrow pit to the north of the highway after the accident.

Picture number 14 shows the condition of the Pontiac automobile following the collision and after the Pontiac

had been removed from the bridge in question to the southwest of the bridge and shows the position of the impact of the Pontiac automobile and the wrecked condition, including the crease in the top of the Pontiac which will be referred to later in the argument demonstrating that the impact between the two automobiles was not one of a hooking a front end of the Pontiac and dragging it across the bridge, but rather a direct impact between the left front of this Pontiac directly so that the Pontiac was spun around and lifted without progressing further westerly into the bridge into the position that it is shown in the photographs taken immediately after the casualty.

Photograph number 15 also shows the condition of the Buick automobile, the position of the force of the blow, the tearing of the under structure of the Buick, something of which, the evidence will show, made the gouge marks which indicated the point of collision in the south lane of the bridge as testified to by patrolman Hardesty, and the condition of the Buick after it had been removed from the borrow pit and taken to a garage yard in Malta. Picture 14 and 15 showing the respective position of the left sides of the two automobiles which were involved in the collision and after the casualty in question.

There are three dimension slides also marked as exhibits which will show the condition of the automobiles and the markings on the bridge in color and which will be referred to in the testimony when we reach the argument in connection with the case in this Brief. The stereo exhibit number 8 is a 3-D stereo which, when viewed through a viewing box, will show the front of the Pontiac and which shows the front of the Pontiac indicating the direct

crash against the Buick and other points which will be referred to in our argument.

Plaintiffs' exhibit 9, a 3-D stereo, looking through the viewing box, shows the left front of the Buick automobile as it was crushed backward from the letter 'k' of the 'Buick' on the front, over the entire left front, and will be referred to in our argument in this Brief.

Plaintiffs' exhibit 10 is a 3-D stereo that illustrates in color and three dimensions the left side of the Buick as it is crushed towards the right side of the Buick.

Then outside of the plaintiffs' exhibit 4 and directly numbered pictures, which will be identified by their not being any numbers shown in the negative, but which will be identified by the identification marks on the exhibits, 11, 12, 13, 14, 15 and 16. These are all photographs taken in the garage after the Buick was removed from the barrow pit and show the entire right side of the Buick automobile indicating that in the collision, the point of which we will argue, is demonstrated by physical facts, the Buick was forced up over the bridge timber or sleeper at the bottom of the bridge against the rail which is demonstrated by the crushed front right hand tire and the scraping along the entire side of the Buick which shows that the force of the Pontiac in the collision as it came into the lane of the Buick, pushed the Buick, the right front end, up on the sleeper and the remainder scraped along the bridge rails as is indicated by the photographs and three dimension slides and that show that the Buick was scraped from the front of the hole in the right fender clear back to the back end and the bumper as the Buick passed between the Pontiac, up on the bridge sleeper, until it dropped

down and swerved around into the barrow pit north of the bridge.

Exhibit number 17, being a 3-D slide, shows the guard rail of the bridge and the markings upon it. Plaintiffs' exhibit 18 stereo is a closeup of the same area showing the paint scrapings extending to the west at a point 45 feet from the east end of the bridge. Plaintiffs' exhibit 19, the 3 dimension slide, shows the bridge 40 feet from the east end of the bridge.

Plaintiffs' exhibits 21, 22 and 23 are 3-D stereos showing that the Buick was pushed against the south rail for a distance of twenty to forty-five feet from the east end of the bridge.

The stereo, plaintiffs' 25, indicates the highway coming over the knoll and that the highway was perfectly straight ahead.

Exhibit number 34, which is the sketch upon which the witness Stanley Hould, made a drawing showing the position of the bridge and the relative position of the bridge and the timbers and the posts as well as the dimensions which later were confirmed by the testimony of the highway patrolman, who indicated upon this sketch the conditions and the physical facts which appeared immediately following the collision and which indicated the position that the cars were at the point of impact, and which later in our argument we will show are physical facts which make the finding of the Court that Mary A. O'Keefe was traveling on the north lane and over the center line and fixed upon her the responsibility for the collision was clearly erroneous, in fact impossible to have happened under the physical, demonstrative evidence that is shown in this case.

SUMMARY OF THE EVIDENCE

RAYMOND O'KEEFE (Tr. 77-87, 322-324).

The testimony of Raymond O'Keefe will be analysed in detail later in the Brief, but it is sufficiently to briefly state that he is and was at the time of the casualty a resident of the Province of Ontario, County of Essex, near Windsor, Canada, and was driving in the State of Montana and riding in the State of Montana on the 30th day of August, 1955, and at the time involved in this casualty, he was riding in the car and it was being driven by his wife, Mary A. O'Keefe, and in the car were the two children, Catherine and Michael. On the day in question, at about 9 o'clock or 9:30, the wife was driving and they were approximately 12 miles westerly from the city of Malta and approximately 100 miles from the city of Havre which they had left about 5:20 of the morning in question. They approached the bridge in question. Mary O'Keefe had considerable experience in driving automobiles and had been driving for 10 or 12 years; and in the last 4 or 5 years before the casualty, she had been driving every day, both pleasure and business; operated motor driven equipment, tractors and trucks; she had reached the age of 36 on the 30th of August, 1955.

Raymond O'Keefe was occupying a position in the center of the rear seat as they were traveling eastward. The bridge came into view approximately four or five hundred feet ahead. The road was straight for quite a ways, and during this time, Mary O'Keefe was continually driving on the right hand side of the highway unless she would overtake an automobile. She was traveling at an estimated

speed of 40 to 45 miles per hour, and at the time in question, she may have slowed to 40 as she was coming toward the bridge; and she continued on her own right hand side as she came upon the bridge; and did not swerve away from her right hand side.

As to the traffic on the highway, he saw an automobile coming from the east, which was the Pontiac involved in the accident and he did not observe any other cars in the immediate vicinity at the time. The Pontiac car was coming down the incline towards the bridge from the east, and when it got very close to her, coming upon or on the bridge, it seemed to sway right at her. Mr. O'Keefe raised up in the back seat. The incline that he mentioned was a couple of hundred feet from the bridge to the east, and he believed the incline started 30 or 40 feet easterly from the east side of the bridge; and before he saw the car coming down the incline, he did not see it on the highway to the east because when you got back far enough you cannot see the bridge over the incline to the east. In describing his remembrance of the collision, he saw the car coming at them, it seemed to be coming fast and swerved just before it got on top of her, immediately before the collision. The actual impact which took place on the bridge towards the easterly end of the bridge and in the instant immediately before the collision, the Buick car was near the right rails and the impact between the two cars occurred. As near as he could remember, the Pontiac car hit the front end of the Buick car as the cars came together in their front ends. Immediately after the collision, the Buick car turned in a northerly or left hand direction and went into the ditch or barrow pit. He made a casual observation of

the position of the left front wheel and it had been driven upwards and back, and the Buick car followed the crushed position of the front wheel in swinging around after the accident into the barrow pit. He observed the position of Mr. Schoepski's automobile immediately after the collision, and it was on the bridge, heading to the left side to an angle to the south side, and it was across the center line of the bridge to the south.

Mary O'Keefe slowed the car, which she generally did, as she came upon this bridge.

The actual impact took place on the bridge; towards the easterly end of the bridge; and in the instant immediately before the collision, the Buick car was near the right rails and the impact between the two cars occurred.

From where Mr. O'Keefe was seated there was no obstruction to the view ahead and there were no obstructions on the other side of the bridge, except, of course, the hill that rose to the east, and there were no other cars in the immediate vicinity at the time of the collision, immediately before the accident.

WALTER SCHOEPSKI (Tr. 284-289).

Walter Schoepski, the defendant and driver of the Pontiac, testified that he lived in Beloit, Wisconsin; was 60 years old and was 59 at the time of the accident; had been driving automobiles since 1927; he was riding with his wife; he left Beloit in August, 1955; and they were in Williston, North Dakota the day before the accident; stayed there over night; it was dark when he left Williston and he had the car lights on traveling westward; he came upon the narrow bridge sign at a point east of the bridge and he took his foot off of the gas and pressed on the brake a

little to slow it up; he saw the automobile coming from the west towards him, and he continued on after passing the sign at the brow of the hill; he would say that the Buick automobile was about to enter the bridge at the same time that he did; he knew it was a narrow bridge and he was trying to hug the rail and stay on his own side of the highway because he knew he was on a narrow bridge, and he stayed on the right side of the highway, and he continued to hug the rail at the bridge which had been identified as the north rail of the bridge; his car didn't sway or jump like a frog; the mechanical condition of the car was o-kay; he said his eye sight was good; he was a machinist and working in a machine shop, working with a boring bar; he doesn't recall exactly what happened at the time of the collision or the impact, but he would say he was driving around 40 miles, maybe a little bit less per hour; he recalls entering the bridge, recalls hugging the north railing and the next thing he recalls is after the accident.

On cross examination he reviews his testimony given on direct examination; he didn't recall that the car pulled towards the left as it came down the hill or the last drive to the bridge, and he would say that it did not pull him towards the left as he was sitting there driving; he was on the left side of the car and did not try to make towards the center of the bridge to avoid the north rail; he stayed as close as he could to the north rail, that is what he was watching. As he came over the knoll where the sign said narrow bridges ahead, he had come up there down a slight grade, he saw the Buick ahead and he came up there on that slight grade, he did see the Buick approaching, and

at that time didn't see anything about the Buick that caused him to be concerned at the time, and as far as he can remember he didn't see the Buick off of its own lane at the time, but he is sure that he stayed in his own lane.

TESTIMONY OF VERN KAPPHAN (Tr. 118-122).

"I resided about 12 miles northeast of Saco on August 30th, 1955. On that early morning I had occasion to drive from my ranch towards Malta and I arrived at the bridge at the easterly end of the lake, around 9 and 10 somewhere, between 9 and 10. I was going west in a pick-up, it was a Ford pick-up, and my son was with me. Concerning testimony about a wreck that occurred on a bridge, I am familiar with the bridge and I had occasion to drive up to that bridge, or close to that bridge, on that morning. There was some cars on the east side and some on the west side too. There was a Buick car in the north barrow pit, headed north." Which would be on his right hand side as they were coming towards the bridge, and he saw the cars in the vicinity of the bridge; there was one car right on the bridge, it was a Pontiac; there were quite a few people there; there were two children lying on the bank on the highway; there was a lady there, and he thought there was a man laying there; there was a man and woman laying on the highway or side of the highway on the west side of the bridge.

"When we came up there in our car, we walked over. We left our pick-up in line with the rest of them and walked on up, walked right on to the bridge. We stopped a minute or two there by the east of the bridge, where the children were, and where the Buick was in the ditch,

and then I walked right on clear across the west side of the bridge. I never went off the road."

"As I came upon the bridge, I came upon the automobile that was on the bridge, it was pretty close to the center of the bridge. It might have been a little further to the east side than it was to the west side, but it was further south than it was on the north. I would say the front end of the car was over the white line, as we call it. I am speaking of the car that was on the bridge. The car was setting at a little angle, front end I would say was over the white line. I don't know whether there is a white line right on the bridge or not but it was setting far enough, there is no doubt of it, it was over halfways, because when Bill came with the ambulance, I took hold of the fender which was lying out there and pulled it back and several other guys took ahold with me, and I think we moved the car a little bit so he could get through with the ambulance; we moved the car a little to the north, and before it was moved to the north, the front end of the Pontiac was over the center line or on the south of the line." (Record—page 121.) "As we moved the Pontiac car a little to the north, there was some pieces of some car that we moved out of the road there, but I wouldn't know whether they were off of the Pontiac or whether they were off of the Buick; it is pretty hard to say what the pieces were, as far as that goes, but there was pieces broke off of either car, and I don't know which car."

"Looking at plaintiffs' exhibit 4, photographs 3 and 4, I would say that that car was setting on the bridge, and compared to the picture after it was moved by the four men, we moved it straighter; we moved the front end

over and picked the fender up so that he could get through. After the Pontiac was moved from the south side there was somebody drove through there and the man that drove through there was the coroner, Mr. Bell."

CROSS EXAMINATION VERN KAPPHAN

"I couldn't tell you right to the inches or feet how far over the white line to the south that the automobile on the bridge was when I saw it; I didn't measure it; there wasn't room enough for a car to go through there; that is why the traffic was held up; there wasn't room to go through until we moved the car; I don't know how many of us moved the car, there were a lot of men standing around there and I couldn't say particularly that I knew any of them that took hold of the car outside of me."

"I would say that the front end of the Pontiac was five or six feet away from the south rail before I moved it. It would be close enough that they couldn't get through with an outfit, just impossible to drive a car through there until it was moved. After we moved it, I laid the parts back down on the road, that is as far as I could. I just moved them out of the road so we could get through with the ambulance. What I moved was right beside the Pontiac. I wouldn't say that there was a white line on the bridge, I don't know.

Before the car was moved and looking at photograph number 3 of plaintiffs' exhibit 4, I will tell you where that fender was. Apparently that is a fender, isn't it, that I am pointing to in the center of the picture?" A. "Yes."

"Before I moved the automobile, the fender was laying right about here. (Indicating.) It was laying pretty close

there I would say, but I don't see how it could have been though after we moved it. We moved it and he went through with the ambulance, I am sure, before the picture was taken. My testimony is that we picked that fender up and he drove through. I wouldn't say that we picked up the front end of the car, we just moved it, we just shoved it over. I didn't see the condition of the left front of the Pontiac when it was shoved over. I did not note whether or not the left front wheel gouged or marked the highway."

Looking at the picture number 3 and looking at the position of the car, I think it was a little straighter than that, and when I moved it, it was over closer to the south rail. It was setting so he couldn't drive through, right the way it was setting there with the fender picked up you could drive through there. Picture number 3 is not in the same position that it was when I first saw it. It was touching the rail here. I don't think it would touch the rail when we come there, I wouldn't say. In picture number 3 of plaintiffs' exhibit 4, it appears that the Pontiac is touching the rail and it wasn't touching the rail when we came there. As to the markings on the bridge, I couldn't tell you whether either side was marked, because I didn't observe the railings on the bridge.

Observing photograph number 5 of plaintiffs' exhibit 4, well, the front was smashed up, but whether it looked exactly like that, we did not pick it up, we just slid it over and moved the stuff out of the way so he could get through with the ambulance. I did not look afterwards to see whether or not it had marked the bridge or the pavement, and I don't know whether or not the left front wheel or

the left front tire had been cut off the rim of the wheel so that the rim was resting on the pavement."

"That fender that is shown in photographs number 3 and 5 of plaintiffs' exhibit 4 was laying right along side of the car, back here a little further I would say, and this front I would say, we moved it back. My testimony is that it was impossible for an automobile to pass between the south rail of the bridge and the front of this car before I moved it."

"The Buick car was through there when I got there. It was in the ditch. The Pontiac could have been moved a dozen times after them pictures were taken if he took them after I was there, which he had to do because I wasn't the first man there. We had picked the people up, or someone else had, I didn't touch any of them, but they were picked up and went ahead into town before we left there; and I didn't see Mr. Coles, the photographer, there at any time that I was there. The cars could have been moved after I left there too. I observed the Buick in the ditch when I arrived at the scene. As to the kind of a car that was parked at the head of the line there to the east, I couldn't tell you that. I don't remember whether or not there was a car parked on the left side, there could have been, at the left side of the entry to that bridge, there could have been, but I don't know. There was a Ford station wagon there that picked up somebody there. I think it was the lumber yard man at Saco, Pat West. At least, the man had a station wagon there that picked some people up, but I don't know whether he was at the head of the line or where he was. As to whether a small panel laundry truck at the east end of the bridge could have

been there, I don't recall that, it could have been. There was a girl taking care of two children. Yes, there was a woman, but I don't know who she was. I would say that we did not move the back end of the Pontiac. I would say 'No' that that wasn't moved. I would say that the back end of the Pontiac was not moved while I was there. I would say that the car had moved quite a bit since the time that we moved it when the picture was taken. I would say, unless it was like you boys was explaining, the width of it, you know, unless it was like your explaining the angle there on it. It doesn't look the same to me. Unless you are setting on an angle like he was talking about the angle of the lense of the picture. The automobile that I have been looking at in these photographs, facing in the same direction when I first got there, it was setting on an angle like that on the bridge. It was standing at an angle on the bridge just about like that. It was heading about what you would call west, I would say, I wouldn't know."

RAYMOND CHARLES HOYNES (Tr. 129-134).

"I am a highway section man, and I was engaged in that work on the 30th of August, 1955. My station was Malta, 14 miles east and 26 miles west on highway number 2. I was working at the station for the highway department on the 30th of August, 1955.

I am acquainted with the bridge that is located toward the easterly end of Bowdoin Lake. The bridge is approximately 12 and one-half miles east and northeast of Malta. I had occasion to go over that bridge on the morning of August 30th and on other days too, and I know the rail-

ings of the bridge enough to know something about their condition. When I came through there on the morning of August the 30th, 1955, I know the condition of the railings on each side of the bridge that morning, and the direction of the bridge in that vicinity is approximately east and west. As I went over it that morning I noticed the railing on the south side or the north side as I went through. I observed both sides. We do every time we go over the bridges, it is a part of our job to look out for anything unusual. On that morning, I would say approximately 9 o'clock, I crossed the bridge going east and I went approximately a mile and a half to the end of my section east past the bridge. On that morning the south rail of that bridge was clear of any marks. They were clear of any markings with an exception of a sliver off or something where it may have done it with a snow plow. As far as the railings and the boards that went along the south side of that bridge, they were free from any scuffing or any splintering that would be noticeable to just casual observation. There were no paint scrapings on the bridge as I went over it that morning. When I returned from my trip about a mile and a half or two from the east, I saw this accident when we came over the hill. When I say the accident, I did not see the accident happen, I saw the result of the accident after it had happened. When I came upon this accident after it had happened, then we just had the one vehicle. We pulled it off to the side of the road and went to see what the accident consisted of. When I got there I did see people around there. I mean that where the accident was, there were people that were involved in the accident. We saw two little children on a

blanket on the shoulder of the road, right at the end of the bridge; and on the other end of the bridge, there was the woman lying on a blanket on the west end of the bridge, on the shoulder of the road. I saw the cars that were involved in the accident, but I did not make too close an observation of the cars. I see that there was one in the barrow pit on the east end of the bridge and the other car was on the bridge. I just casually looked at the automobiles because there was quite a bit of trouble with traffic and I had to take over the traffic situation. There were several men walking around there, and I saw a man walking around there that had apparently been in the accident. That was Mr. O'Keefe. He had blood running all down his face and he had a cut over his eye or some blood running down his face. I just walked past him when I passed the vehicle to get a bar out of the vehicle to try to open the door of the Buick.

You are directing my attention to picture 12 of plaintiffs' exhibit 4 and looking at the railing that appears on the right edge of the photograph there, and I remember the railing that morning; the railing was not in that condition which appears in that photograph when I went through the bridge there that morning going east, but it was in that condition when I came back. I notice that there is a vehicle apparently that is at the east end of the bridge on the north side and I recognize it. When we came back from the east I noticed that vehicle shown in the picture. I couldn't say for sure looking at picture number 13 of plaintiffs' exhibit 4, but as I said before, the bridge was splintered up some, maybe due to a snow plow or something that rubbed it, but I don't know. I don't think that

there was anything on that lower railing before the accident. At any rate, I did notice this middle railing after the accident and did see a condition such as is shown there.

Looking at photograph number 3 which is looking west in the picture number 4 of plaintiffs' exhibit 4, I notice a railing along the north of this picture now, picture 4 of the exhibit 4, we are looking east and I observe a car on that bridge at the time that the picture was taken; and with respect to the railing along the north of that bridge, I did not notice any splintering or paint scratches on the north side of the bridge.

Looking at photograph number 3 which is looking west 4, I look at it and notice that the direction that we are looking in that picture is west, and I observe a sign that appears to the right of the highway, which I am familiar with. On that morning, as I went east, the sign was there and it had been there for some time before that date, and I know what the sign said. It says 'Narrow bridges in the next 10 miles.' I had passed over this area a good many times in my work and there is nothing to obstruct the view of a person approaching along that road. There is a little rise in the road further down, but you can see that sign for several hundred feet and by the shape of it I know that it is a warning sign.

At the time I arrived there, they were removing one of the children. They put the child on a blanket out on the east end of the bridge, on the north side, and this other woman they had carried her up to the other end there and she was lying on a blanket on the shoulder of the road. I also saw a woman in the red Buick, on the east end of the bridge. I went up pretty close to the car and I

saw her. She was crumpled up under the steering wheel and was still alive at that moment, but we couldn't get the car door open.

At the time I first saw the woman in the car, which was after we pulled up here, the children were on the shoulder of the road and another lady was being taken over to the west side. That lady was still alive.

With respect to the south side going back to the south rail, I will tell the Court there was no paint smudges or spots of paint on the south rail that morning when I went out, and when I came back, there were, and the color of those paint smudges were red.

I am familiar with the section from the east end of the bridge on the south side back 6 or 7 posts. The last time I paid attention to them was three or four days ago, and there were paint smudges there at the present time. I have been familiar with those paint smudges about a year with reference to the accident. The first time I saw them, with reference to the accident, was the morning of the accident."

CROSS EXAMINATION—Raymond Charles Hoynes

When you asked me if I wouldn't say that all the paint smudges on the south rail of that bridge at the present time had been there ever since the accident, well, I couldn't prove that it was, but I haven't seen any different from the time of the accident up until now, and when my recollection is refreshed a little as to whether there is orange paint smudges on the south rail at the present time, well, you could call it orange if you wanted to maybe. Red paint rubbed along on white paint would make a sort of a

orange paint. White on red will make orange, pretty much so. This particular paint that I saw on the morning of the accident, immediately after the accident, I can't say if there was orange, but there was red paint on the bridge. As to the particular paint that I saw that morning immediately after accident, I can't say that it was orange, but there was red paint on the bridge. As to whether there was orange paint or orange colored paint on the bridge somewhat to the west of where this Pontiac was when I was there that morning, there may be, yes, there is some sort of orange colored paint on there alright. As to whether there was orange colored paint as distinct from anything that might have been red, well, I didn't, as I say, think that there was any difference with the red on the white stretched along the bridge—I might call it all red or orange.

When I was coming back from my assignment that morning at the end of the route to the east, I would say we were back to the bridge about 9:20. We drove a mile and a half there was somebody else there. There was about three cars, probably three vehicles on the east end of the bridge—maybe as many more on the west end, two or three. I stopped on the east end of the bridge behind those vehicles that were there. I can't describe the vehicles now, but I believe there was a laundry panel outfit there, but I wouldn't know the color of it. I don't recall another vehicle to the left when I stopped near the east end of the bridge and I don't remember that. As to whether there was a slight young girl there with a kerchief over her head, I can't say—I didn't pay attention enough to it. I went across to the Pontiac and then turned

around and went back and saw this woman in the car, and they couldn't get the door open so I went back to the truck to get a bar to pry the door open. I didn't see anyone in the Pontiac when I went by it. The people were already out of the Pontiac. When I got to the Buick, the woman was slumped over the steering wheel. I was there when Mr. Coles, the photographer, came, and I think she was still in the same position at that time; and I say when I went to get the bar, the woman was alive.

The narrow bridge sign that appears in picture number 4 of plaintiffs' exhibit 4 was the only sign close to the bridge. There was a sign some miles west, but no sign to the east besides the sign that was there.

I look at the north rail as you show me the photograph number 3 of plaintiffs' exhibit 4 in this case, and the mark of some sort near the post above the right rear bumper of the Pontiac or the automobile that I see sitting there, and I did not observe that gouge on the north rail of the bridge.

PHILLIP VERT (Tr. 139).

For the purpose of saving repetitious testimony, for practical purposes the testimony of Phillip Vert coincides with that of Raymond Charles Hoynes. It appears in the Record—page 139 through 143.

CHARLES McCHESNEY (Tr. 144)

“My name is Charles McChesney and I live at Saco. I follow the occupation of ranching. I have one ranch 12 miles northeast of Saco and one is 50 miles southwest of Malta. I have been engaged in ranching operations al-

most 40 years in this vicinity. I homesteaded near Saco and I have been active there ever since. My work requires that I drive back and forth between the two ranches occasionally, and I had occasion to start the trip from my home to Saco to the ranch south of Malta on the 30th of August, 1955. I traveled over highway number 2 to Malta.

As I was traveling towards Malta, I came upon the accident. It was at a narrow bridge on highway 2, north and a little east of Bowdoin Lake, between Malta and Saco. When I arrived there there were two or three other automobiles ahead of me. I think I was even the third or fourth car. I came from Saco towards Malta, towards the east end of the bridge and I imagine I must have been close to a hundred feet from the east end of the bridge, behind two or three other cars. We were held up there, but when we crossed the bridge later, we drove on the south side of the highway going west.

With relation to the bridge, I stopped in the line of traffic back of the bridge and it would be east of the bridge and about a hundred feet from the bridge, I would say. As I arrived there, I got out of the car and walked over to the first car and noticed Mr. O'Keefe's children lying on the bank, and I think he was lying along side of them. The car that I noticed was a red Buick and it was just east of the bridge with the front end of it hanging over the embankment into the barrow pit. I observed the other car that had figured in the accident or had been involved in the accident and it was a Pontiac car. The Pontiac car, as I came up there, was sitting across the center line, possible the front end of it I would say a little more than three feet across the center line of the marking on

the bridge facing to the southwest. The Pontiac was across the center line to the south facing in the southwesterly direction, and there was not room, when I first came up there, there was not room to pass between the south railing of the bridge and the Pontiac automobile because the Pontiac was too far over the center line facing to the southwest, and there was not room enough for another car to pass it.

While I was there, there was some change made in the position of the Pontiac automobile. Four or five men got ahold of the front end of the Pontiac and skidded it over so that the traffic could go by, and after that was done, the traffic got by through there while I was still there. I didn't remain there, I took my turn going across the bridge after the Pontiac had been moved.

When I look at picture number 3 of plaintiffs' exhibit 4, it appears to be one of the vehicles involved in the collision, that is, the Pontiac. I observe the portion of an automobile lying to the left of the front portion of that car in the roadway there. I was there when that portion of the automobile was placed there. It was placed there so that they could take a picture of the vehicle. I observe picture number 2 of plaintiffs' exhibit 4 and I recognize the other vehicle in that accident. It is the Buick automobile that was involved in the accident, and it is in the position approximately it was when I came up there.

CROSS EXAMINATION—Charles McChesney (Tr. 146).

I observe picture number 3 of plaintiffs' exhibit 4. When I first came up to the accident, as near as I can recall,

that portion of the automobile was lying over here. It was taken out not for the ambulance but for the panel job from Glasgow to take Mr. O'Keefe's children to the hospital. Then it was put back there for the photographer to take the picture. As near as I can remember, the part of the automobile was lying right close to the railing, right close to the bridge railing—about opposite where it shows in picture number 3. I wouldn't say positively as to that because those are some of the minor details that a fellow wouldn't pay particular attention to, but I remember very distinctly that being moved and I don't remember who removed it. I think there were three or four men and they didn't lift the front end of the Pontiac, they just skidded it over. Got down low with main strength, I suppose you would call it that. There were four men, four or five men. As to whether they took hold of the bumper, well no, there was no bumper there. The bumper was pretty badly bent up. They took ahold of most anywhere that they could get ahold of the vehicle and I didn't observe whether some parts would bend or give—I didn't observe that. When they moved the vehicle, I was on the east side of the bridge, probably standing along side of my car—it would be about a hundred feet from the place where the vehicle was located, so that I couldn't see the front of the Pontiac when that moving operation was going on, but I am sure that the Pontiac was about three feet over the center line, but I did not measure from the center line, that is an estimation on my part. Of course, there is actually no center line on the bridge. I was estimating by eye and approximate distance. I think that the bridge is approximately 20 feet wide. I am sure it is

quite narrow. It is more narrow than the paved portion of the highway in the vicinity.

When I first came up there I know there was just a very few cars there. I was either the third or fourth car there, I am sure of that. One of those ahead of me was a laundry panel. I couldn't identify it that is, I couldn't identify who it belonged to. I observed somebody that reported to be a nurse there by the children lying on the highway. There were quite a lot of folks around there before it was over with. When I first got there, there were very few people. I know that the panel truck was there. I don't recall whether there was a green station wagon there or not . I don't recall that. I do not recall whether there was a vehicle parked on the south side or shoulder of the highway to the east of the bridge.

A laundry panel went through after the Pontiac was moved. It had to be moved before the laundry panel went through. I am only speaking of the panel laundry truck. The Pontiac had been moved before it went through and a piece of the automobile that I referred to also had been moved back. I saw the piece of the automobile put back for the purpose of taking the picture and I don't recall who put it back.

CLEO E. COLES (Tr. 108).

We will not relate the testimony of Cleo E. Coles in our Brief because it is the testimony of the photographer who took the pictures and the stereo slides and his testimony appears in the Transcript, beginning with page 108. The testimony is directed to the identification of the respective exhibits and can be conveniently checked

with the exhibits by reviewing the testimony of photographer, Cleo E. Coles through page 118.

GENE SEEL (Tr. page 149) and WAYNE LONG (Tr. Page 161).

These are the men who were operating the wreckers and who removed the two automobiles from the scene of the accident and their testimony appears in the Transcript with the detail of various matters that were concerned with the handling of the automobiles, and their testimony was to show that there was no damage done to the vehicles in question in the process of moving them from the bridge or from the scene of the accident. We are not narrating the testimony because it is directly related to the conditions of the automobiles and the fact that they were not altered in the process of removing them from the scene of the accident, and that they were in the same position for all practical purposes when the photographs were later taken at the respective garages where the vehicles had been removed.

STANLEY JAMES HOULD (Tr. 166).

Stanley James Hould made measurements and prepared the foundation for the sketch, plaintiffs' exhibit number 34. He was examined concerning the dimensions of the bridge and the distances between the posts and the red markings on the south side of the bridge and the bridge timbers to the south of the bridge. He testified that the measurement of the width of the bridge from the base of the sleepers was 19 feet $27\frac{7}{8}$ inches on the west end and 20 feet 3 inches from the outside of one sleeper log on one side to the outside of the sleeper log on the other side,

which measurement would be only to the inside of the posts or to the inside of the posts on the opposite post across the road, and the distance between the posts varied a little. They varied from 6 feet $1\frac{1}{3}$ inches to 6 feet 5 inches. These were not differentiated on the sketch because the average distance appears from the testimony. There were 16 posts on the north and 16 posts on the south side of the bridge. He testified as to the paint scrapings and the scrapings on the bridge and he made a record of a particular thing that appeared on the bridge as far as the posts or railings were concerned—24 feet and 8 inches from the west end of the bridge, he found a scrape with paint and white paint scraped off a piece 2 feet and 10 inches long. Then the distance between this first scrape and the second scrape was 14 feet and 1 inches and from the second scrape to the third scrape it was 19 feet 6 inches, and that large scrape was 5 feet 8 inches long and about 1 inch of this 3 by 8 was completely chipped off the top at that point, about 3 feet of it was completely chipped off of it, and that is 38 feet from the east end of the bridge, and to the last indication of it going east would be 32 feet 8 inches. He went from the east end of the bridge on the south side to find the scrapings and gouging that was where the chipping out occurred. The one on the east of the bridge started 38 feet from the east end of the bridge. These are marked on exhibit 34.

He testified that there were paint markings along this side of the bridge. These are marked on exhibit 34.

He testified that there were paint markings along this side of the bridge and that they were red in color.

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He testified that there were paint markings along this side of the bridge and that they were red in color.

WILLIAM C. DOVE (Tr. 213 et. seq.).

William C. Dove, sheriff of Phillips County, Montana, at the time of the collision, went to the scene of the accident. When he first got there there was lots of traffic lined up on both ends of the bridge, and the ambulance had just passed him just before he got to the scene of the accident. The ambulance was going towards the bridge, and passed him as he was on the way. When the sheriff arrived at the bridge, the ambulance was there. His memory was confused as where the ambulance was, finally he said 'I believe it was the west side.' They were loading the people on the west side of the bridge and he helped. As soon as the people were loaded in the ambulance he called for the wrecker and the photographer by radio attached to his car. The photographer got there in a matter of twenty minutes. The first thing he did after he arrived was to help remove the injured, then inquired if anybody had seen the accident. There were quite a few people there and he asked for eyewitnesses. He was left with the impression that nobody had seen the accident. He made an investigation on the ground concerning the accident later after the photographer and the highway patrol arrived. The highway patrolman arrived there just a few minutes later than the photographer. He was informed by the highway maintainance men that they had wanted to move the Pontiac, but they wouldn't allow it to be moved, and they only moved one fender which would have been the left front fender in order to get a car through in order to take the children to town. They showed him where it had been laying and they marked the spot, and that had been swung around to the right out of the road so that the

car could get through to take the children to town. The highway maintainance men pointed out to the sheriff the position in which the fender was before it was moved and he had them show where it had been before they moved it and they moved it back to the same place so that the photographer could take the picture of it.

When the highway patrolman and photographer arrived he made an investigation on the ground and that at the place where the accident took place. He relates his experience then in connection with investigating accidents—(Tr. pages 215 and 216). Later he said he did make an investigation. He was not giving conclusions but will tell what he observed.

There was a Pontiac car sitting on an angle in the easterly portion of the bridge with the front of it across the center line headed in a southwesterly direction. There was the red Buick in the ditch just off the east end of the bridge, sitting right across the barrow pit with the nose of it in the bank on the north side.

With relation to the bridge itself, he observed where the markings on the south side of the east portion of the bridge where a car had scraped along the bridge and there was red paint on the bridge. There was also red paint on the Buick. The highway patrolman and witness measured the markings. Sheriff held the tape while he took the figures down, read the tape and marked it in the report book. The witness noticed the railings on the bridge and noticed with respect to the floor of the bridge debris and there was debris at the front, and looking at it, it would be to the right of the Pontiac assuming where the collision happened, there was debris under the Pontiac there. There

was also debris which he assumed to be acid that probably was radiator fluid in the path where the Buick had taken to go into the ditch, and there was something there that he presumed was acid or radiator fluid and it followed the course which the Buick had taken into the ditch and it was deposited along the south side of the bridge and then in a left angle to the ditch to the back end of the Buick. It seemed to him that the acid and radiator fluid started with respect to the bridge itself as though it was a little ahead of where it hit the bridge or where it scraped along the bridge. That is where it was most prominent, but there was debris along the edge of the bridge also. When he said ahead, he meant ahead of the point where it started to scrape the bridge—east of the point. The debris was on the south side of the road and it swung at an angle around the north side of the road, and with relation to the Pontiac car, the debris was to the south side of the center line and the front end of it there. The front end was on the south side of the center line and there was debris there on the south side of the center line. With respect to this pile of dirt, directing to the position of the Pontiac automobile, this dirt or debris from the Pontiac or in relation to the Pontiac as regards to the center of the highway, was to the south of the center; and with respect to the debris to the west from the Buick car, it was on the south side of the center of the highway. Relating about the identification of his automobile, the sheriff said that he had his blinker lights going. When he arrived possibly a quarter of a mile from the scene there was a lot of automobiles stalled and stopped along there and he had his siren sounding intermittently in addition to the

blinker lights. The blinker lights were on top of the car to the front and a blinker light on his right front fender, which had the legend on it "STOP."

When the ambulance got there he went to the ambulance and there were a group of people around there and as soon as they got the injured in the ambulance, the sheriff asked if anybody had seen the accident. He asked several different times and nobody seemed to have seen it. At least if they did, nobody made themselves known. He spoke up on both sides of the bridge and asked if anybody had seen the accident. He was in his shirt sleeves and his star was showing very plainly. Anybody could see who he was. He wasn't dressed with a suit on, but he had a big nickel-plated star, and he asked the general group if anybody had seen the accident which nobody made a response.

Going back to the debris with relation to the Pontiac car and the place on the bridge. His best recollection is that the debris was in the easterly end of the bridge. The east third portion and on the south half and along the side of the Pontiac which would be the left side of the Pontiac toward the rear so that from the front to the rear and along the edge of the bridge, where he assumed the Buick had passed, there was debris to the left of the Pontiac and debris on the south side along the bridge where he thought the Buick evidently went circling around to go where it was, and the heaviest part of the debris was, with reference to the center of the highway, it would be to the south of the center. With respect to both the Pontiac and the Buick, there was debris to the front and left of the Pontiac and along the side of the Pontiac on the left side in

the position that he saw the Pontiac when he got there, and the other debris was right along the side of the bridge --the south side where the car had scraped the side; and compared to the debris which he described as being near the Pontiac, the debris started right at the front of the Pontiac. The highway patrolman and he measured that across there. It was directly across from the front of the Pontiac at the edge of the bridge and he recalls markings on the bridge that Mr. Hardesty, the highway patrolman, and himself measured. There was some marking on the road in the pavement itself, it was the nature of a gouge or a deep scratch and that gouge or deep scratch, with reference to the position to the Pontiac, it was close to the front of it. The sheriff, Mr. Dove, stayed around the scene of the accident for a period of two hours. He was there until both cars were removed and the highway was cleared. During all of that time he had his badge on his shirt and he had his automobile in the immediate vicinity with the blinkers lights attached to it. On the way out from Malta he possibly could have met cars coming from the scene of the accident. The debris he referred to was pieces of the car, pieces of glass, radiator fluid, dirt that you don't normally find on the highway and pieces of the bridge that were present. It was quite some feet from where the Pontiac was that you still found debris. He believed that there were fragments of glass here.

DOUGLAS HARDESTY (Tr. page 228).

"My name is Douglas Hardesty. My occupation is that of a Montana highway patrolman, and I was such on the 30th of August, 1955. During the early morning of that day I was called to an accident that occurred east of Malta.

I was notified by radio by the sheriff's office of Phillips County approximately 9:50 A. M. I made a note of the time that I arrived at the scene of the accident and it was 10:25 by my watch. When I arrived at the scene of the accident, I found Mr. Dove had already arrived and had been there for some time. Mr. Coles, the photographer, arrived subsequently because after I saw the type of the accident, I called the sheriff's office on the radio and I asked that the photographer be notified, but he had already been notified and was on his way out.

I have an independent recollection of what I discovered there at the scene of the accident and I have a memorandum; I have made a diagram at the time at the scene of the accident and the diagram includes the length of the bridge; the width of the bridge; the distance from the east end of the bridge to the first marks on the south rail; the distance from the east end of the bridge to the mark which I believe to have been made by the Pontiac on the north side of the bridge and the distance from the front end of the Pontiac, in its position that I found it, to the south railing, not the railing itself, but that portion which they call the stringer which is on the road bed. I made measurements to that, that is the effective width and I have my notes here and I can tell you what other measurements were made by me. In addition to those measurements which I described, I measured the gouge mark, a deep scratch, which was between the Pontiac and the south side of the road, and I measured that in reference to its position between the Pontiac and the bridge, measuring to the bridge. I also measured, not with a steel tape, but by stepping off the distance from the east end

of the bridge to the rear of the Buick. I mentioned the length of the bridge and the width and so fourth. I made two measurements in regard to the Pontiac. One from the eastern most position to the bridge and one from the western most position to the bridge. That would be the front end of the Pontiac. It was sitting at an angle. I also measured the length of the marks on the south side of the bridge which I attributed to the path of the car going towards the east which was the Buick, and made a note of a gouge mark which was nearly between the ends of the bridge on the east side with relationship to its distance from the south side and it was in the path that one of the cars took and I made a note of its position. I don't know whether or not it shows on the photograph or anything, but I made a note of it in my notes. I believe that is the extent of the measurements that I made. From the records and the measurements that I have made, I am able to sketch upon the exhibit (34) that is on the board the position of the Pontiac when I arrived there, and the indications that I stated that I had measured on the ground and I can do that—here, the witness during a 15 minute recess makes a sketch on the exhibit.

I have now sketched in some measurements that I made on the bridge at the time that I arrived and during the time of my stay there following this accident. I will indicate my measurements now to the Judge that I made during the recess and show him what they are. I got the bridge to be 96 feet; I measured 19 feet 1 inch, measuring this end of the bridge from the bottom stringer to the bottom stringer on the other side showing only the actual road surface; I measured from the vehicle that was on the

bridge, from this corner to the bridge was 6 foot 10 inches (see sketch exhibit 34); from this corner of the vehicle to the bridge was 6 feet even.

Six feet ten inches is the first measurement and the angle it was sitting was approximately this angle indicated. It is about 8 feet from the bridge to this measurement here. I measured from this end to the first contact of any roughening of the bridge and found it to be 30 feet 8 inches counting a projection which is not shown on his map. Then the bridge is scraped. There is paint on it for a distance of 19 feet in various spots, the last 19 feet 8 inches bore no evidence of contact. The colliding occurred in the first 19 feet measuring from the westerly end of my measurements. I measured all of my measurements from the east end of the bridge.

Now there was a gouge mark on the highway 2 feet 5 inches in length between the Pontiac car and the south railing of the bridge in this relative position indicated on the sketch. The west end of the mark was 5 feet 5 inches from the south portion; the eastern edge of the gouge was 4 feet 7 inches indicating that the gouge had been made at an angle in reference to the length of the bridge. This mark out on the end which I have indicated was a mark I noticed and it apparently was fresh; it was apparently made by one of the vehicles; there was a mark about 2 feet long 5 feet 7 inches from the eastern end of the bridge to the north.

I have now indicated on the sketch the angle of the Pontiac or the approximate angle of the Pontiac car as I found it on the bridge when I arrived there after the accident had happened and I also indicated on the sketch

the first point which there appears a gouge or a paint mark. I have one measurement that I have a note of here that I would like to add here. There is a bumper mark, what I believe to be a bumper mark 5 feet 4 inches on the side of that railing, the south of the railing; 5 feet 4 inches, that is a gouge mark which I believe to have been made by the rear end of a bumper and I don't believe I mentioned this little mark which I have made to the rear of the Pontiac which is 25 feet 4 inches from the eastern end of the bridge and I believe that mark to have been made by the Pontiac's rear bumper.

On that occasion I observed debris or dropping off of automobiles in that vicinity. There was evidence of dirt, wood chips and some radiator fluid, or fluid which I believe to be radiator fluid, strewn around in that area. Before I arrived there someone or some groups had picked up some of the metal parts and placed them more or less in a pile down at the east end of the bridge so I couldn't make any specific marks showing any particular parts of the cars. However, I did observe wood chips, radiator fluid and some dirt. With respect to those wood chips, radiator fluid and articles which I mentioned, and with reference to the center of the bridge, I may show on my diagram here where I show the wood chips; there were wood chips in this particular area right here, in relation to the Pontiac car, it would be south near the point where I saw the scrapings on the bridge itself; they weren't large, but they were present, that is the wood chips. There was some dirt under the front end of the Pontiac which was not apparent. After the Pontiac had been lifted up and moved away, there was a little dirt on the road to the rear of

the Pontiac back here, not a great deal. I recall dirt in this area only along the front end of the Pontiac, there had been some drainings from the Pontiac which had run out of the radiator and had run to the west! I believe one of the photographs show that.

Looking at photograph number 3 of plaintiffs' exhibit 4, I was present when that photograph was taken with reference to the bridge. Photograph 3 of exhibit 4 correctly shows the position of the Pontiac car at the time that the photograph was taken with reference to the bridge; and indicating to Judge Murray the markings on the bridge that I believe was made by a portion of the Pontiac right there, sir, (Indicating) and I will describe that marking. It was a gouge and a mark; it looked as though something had been rubbed along there under pressure; the wood was depressed, and it was a mark such as you would get if you would put a heavy pressure on the board gouged in there; it starts at the bottom and goes up at an angle; the first portion of the mark is lower than the last portion is and it appears on the top railing of the bridge on the north side. I have indicated, of course, on the diagram and the measurement on the east end of the bridge and along the south that bore the markings that have been indicated on this exhibit as nearly as I could and I measured from the extreme end of the bridge; there is a small protruding portion which does not show on the diagram, it is about a foot in length."

Then at page 234 of the Transcript, the witness highway patrolman, Douglas Hardesty, describes the exhibits, photographs and relates the positions in which he found the Buick and other matters. He identifies the red mark-

ings or the paint from the Buick on the bridge; and recognized the markings that appeared on the vehicle itself; and he relates the position of the car in the barrow pit; he related that he was out at this bridge the week before he testified and can tell his Honor that as far as the markings at the easterly end of the bridge are concerned along there, they are approximately in the same position they were right after the accident; they are still out there.

Mr. Hardesty, the highway patrolman, then reviews the exhibits and with particular reference to the colored stereo views referring to number 17, 18, 19, 20 etc. Then with respect to exhibit number 24, he testifies that this exhibit shows the southern end of the bridge in its entirety and this is the best picture, and that shows the whole picture right there; it actually compiles several of them into one picture; these stereo exhibits correctly show the condition that existed on the day of the accident after he got there and examined it. As far as the coloring on the bridge and the splintering on the bridge is concerned, the southern side of the bridge they show the condition. "They are all a little different picture or angle of what I have previously described and marked on the sketch, exhibit 24 is the best one and I believe it portrays the south side of the bridge most honestly. From the appearance upon the bridge or markings approaching from either side, it did not appear that either one of the cars had braked or had brakes applied before the collision.

Then from page 237 of the Transcript through 246, which is made one of our statement of points and will be taken up in detail at that time in this Brief.

The officer later testified on page 254, the length of a 1952 Pontiac was 202½ inches over all and the width 75 11/16 inches; and a 1955 Buick of the series involved, 206.7 inches in length and 76¼ inches in width.

STATEMENT OF POINTS AND AUTHORITIES

The R. page references appearing in the transcript on page 335 thereof refer to pages in the appellants' Narrative Statement filed with this Court. (See Clerk's Certificate page 330 and 331 of Transcript of Record.)

No. 1. That the Court committed reversible and prejudicial error in its rulings, comments and decisions in the course of the examination of the highway patrolman, Douglas Hardesty, respecting the point of collision of the vehicles on the bridge.

Q. And from your experience as a Montana Highway Patrolman, and from your experience as an officer examining scenes after the wreck, where did the collision take place on the bridge?

Mr. Alexander: Just a minute, that is objected to as calling for the conclusion of the witness.

The Court: Sustained. Do you have any authority, counsel, that he is entitled to make such a conclusion?

Mr. Doecker: Well, your Honor, the only thing that I figured was that a witness of experience looking at a scene after—and describing it first to the Court and showing the position of the vehicles and the markings that appear on the highway, then, he relates a series of facts which your Honor can decide for yourself—

The Court: I don't think it is admissible, but to give you (Tr. 237) an opportunity to present the evidence, I

will reserve ruling on the objection, and he may answer, and you can submit a brief with reference to it.

Mr. Doecker: Well, I would like to make a short qualification of the witness, and then I will call your Honor's attention to a case which my associate has refreshed my memory on.

The Court: Very well.

Q. Mr. Hardesty, how long have you served in your capacity as Highway Patrolman? (Tr. p. 238.)

A. I have served as a Highway Patrolman fifteen and a half years, with exception of the period I spent in the Navy during the war, a four-year period in the Navy during the war. I have had occasion to examine numerous accidents and numerous indications on highways after an accident has happened, and I have had the normal training they give a Highway Patrolman at the beginning. We have a six-week course at that time. Subsequently, we have various courses which are administered the last, a period of about two weeks, which we had traffic investigation data given us. We are supplied with manuals which are published by the Northwestern Traffic Institute of the Northwestern University, and several of our Supervisors have attended there, and they have attended meetings and passed on information they obtained there.

A. Well, I expect that I have investigated over 2,000 accidents, well over that many.

Q. And, now, let me ask you this question: From your examination of the accident in question and the automobiles involved, the markings you observed on the highway, do you believe that you know or reasonably know

where the collision in this accident took place with respect to the bridge?

Mr. Angland: Just a minute, the question is objected to as duplicitous. He asked if he knew or if he reasonably knew. We object to the form of the question.

The Court: Sustained. Find out whether he is telling us what he—whether it is an opinion or a guess.

Q. Well, will you tell us—

The Court: Or if he has an opinion on the matter.

Q. Do you have an opinion, based upon your training and upon your examination of the accident in question, as to the place on that bridge where the collision took place, the impact took place?

Mr. Alexander: Now, just a minute. That is objected to on the ground that the question is duplicitous. It is apparently a sort of a hypothetical question without stating the facts upon which the hypothetical question is based.

The Court: Yes it is. By its very nature it has to be a hypothetical question. Now, you can require him to set forth all the facts that are necessary for the witness to express an opinion.

Mr. Doecker: He has already done that in his testimony.

The Court: Well, I think so, I think that that is true, and we are probably all aware of it, but I think for the record, he would have to show, you would have to ask him what facts he bases his opinion on, the places and the amount of debris, and the amount and places of scrapings and the position of the car when he found it, or the cars, and—

Q. Well, then ask him first in order, to lay a foundation, a question that he can answer yes or no, and ask

him—I ask the witness—I ask you if you have an opinion at this time where the collision between those two cars occurred with relation to the bridge?

A. Yes, sir, I do have an opinion.

Q. And what is that opinion based upon? Relate the things that you are taking into consideration to base your opinion on?

A. Could I step over to the diagram, your Honor?

The Court: Yes.

A. Well, as to what happened back here or back here (indicating) I can't say. There is a condition on the east side of this highway which, unless you correct—

Mr. Alexander: Just a minute, we object to any condition on the east side of the highway.

A. It is related to this thing, in my opinion.

Mr. Doecker: I think he is entitled to answer the question.

The Court: Yes, you may tell what your opinion is based on.

A. All right—which, if you were, at the time of this accident traveling from the east to the west, and didn't make a correction, as you came here, the crown of the road slants from the center to the northerly edge and it is perfectly normal for you to correct—

Mr. Alexander: Now just a moment. We object to the witness testifying what would be perfectly normal under the circumstances—

A. Well, if you don't want to hit the bridge, now let's put it that way.

The Court: *Well, in the first place, we are away of base. He is now testifying and basing his opinion on*

something that isn't in evidence, so let's go back. If you can't ask him the proper hypothetical question, why it's just too bad. We are not going to have him testify—you better present the proper question to him, or the objection will be sustained. We are not going to let him ramble on. You see, he has already started to talk about something that is not in evidence.

Q. Well, are there any facts that you have not related about this accident that is required for you to arrive at your conclusion of the place that this accident happened on the bridge?

A. No, sir, this portion back here is my own idea.

Q. All right.

A. The facts which I believe would indicate—

Mr. Alexander: Now, don't state what you believe. Just tell us what the facts are that you are relying on, Officer.

A. All right. This Pontiac has assumed an angle here across the bridge occupying a portion approximately 18 feet, and the left hand front of the Pontiac is six feet 10 inches from the south rail. The south side of the Pontiac, the front portion on the left hand side is six feet from the side. There is red paint extending from two-thirds to three-quarters of the distance across the front of that Pontiac; south of the Pontiac on the bridge railing for 19 feet is red paint from the Buick. The distance through which this Buick would have to pass at the most here is six feet 19 inches. The width of the Buick is slightly over six feet, which would put the Buick up against the Pontiac on this side, and up against the bridge on the other side. There is no evidence of any accident west of that, so it is my conclusion that the Buick—

Mr. Alexander: Now, just a minute. We object to your conclusion, just keep telling us facts.

A. Well, you asked why I thought that.

Mr. Doepker: He has related—

The Court: Those are the facts.

Q. All right, now, based upon those facts, where, in your opinion, did the collision take place on that bridge?

Mr. Alexander: Just a minute, just let me make an objection, Officer. That is objected to upon the ground that it calls for a conclusion of the witness, that it relates to a subject which is not a proper subject of opinion evidence, that no foundation has been laid for any such opinion.

The Court: Well, I think your objection is good, counsel, at this point, but in order to preserve the opportunity for counsel to do it, I'll reserve ruling on the objection and you may answer the question, but it is a matter you will have to submit authorities to me on.

Mr. Doepker: All right, I will submit the authorities to you later.

The Court: You may answer the question.

A. Would you read the question back, please?

(Question read back by Reporter.)

A. Well, I would say that the collision would have had to have taken place very near the front portion of this Pontiac in its present position, very near that, because there is no debris or anything which would lead me to believe it had taken place in another area.

Q. And on which side of the highway, north or south?

A. Well, it would be to the south of the center portion of the highway as I have concluded from what I saw there.

Q. All right, you may resume your place.

Mr. Doecker: The case of State vs. Bosch, your Honor, from Yellowstone County. I will give you the citation.

The substance of this specification appears in the Transcript of Record on page 237 through page 243 in which the witness, Douglas Hardesty, the highway patrolman, in attempting to show by competent evidence the point of the impact from the physical facts was continually hampered by counsel and was prevented by the Court from clearly setting out the reasons for his testimony and his conclusion.

No. 2. That the Court committed reversible and prejudicial error in refusing to permit the rebuttal testimony of Sheriff William C. Dove respecting a condition of the road east of the bridge which caused motorists to be pulled over the center of the bridge when driving from the east westerly on said highway. This specification is tied into the specification immediately proceeding because the highway patrolman when testifying was prohibited by the Court's rulings from testifying as to this condition which existed at the time of this accident on the highway immediately to the east of the bridge in question, and regardless of any technical objection as to its being proper rebuttal at the time, should have been permitted to be introduced so that the condition which was very material to the contention of the plaintiffs in these cases that the defendant's automobile swerved over the line and across into the southwesterly lane of traffic was entitled to be established in the record to show that it was a material piece of evidence and should have been admitted by the Court.

No. 3. The Court erred in finding as a fact that matters stated in Findings of Fact Number II which was to the effect that the plaintiffs have failed to prove by preponderance the evidence that the injury or damage alleged in each and all of their Complaints were proximately caused by any negligence on the part of the defendant, Walter Schoepski, on the ground and for the reason that the evidence in the case, taken as a whole and particularly with the aid of the physical conditions that were shown by the testimony of the sheriff and the highway patrolman, indicated that it was Walter Schoepski's negligence and none other which resulted in the casualty which occurred on the bridge in question.

No. 4. The Court erred in finding as a fact the matters stated in Finding of Fact Number III to the effect that the defendant and cross complainant was operating his automobile on said bridge at the time of the collision aforesaid in a careful and prudent manner and on his own side of the road; that the said Mary A. O'Keefe, operating her automobile upon said bridge, negligently crossed over the center line and her said automobile collided with the automobile owned and driven by the defendant and cross complainant; that the proximate cause of said collision was the negligence of said Mary A. O'Keefe in crossing over the center line of said highway and into the lane of travel of said defendant and cross complainant on the ground and for the reason that the evidence in the case, taken as a whole and judged from the standpoint of the uncontradicted evidence of the highway patrolman and the sheriff and the other witnesses that came upon the scene, indicated that the negligence of the

defendant was the cause of the collision, the damages and that the driver of the automobile, Mary A. O'Keefe, throughout the travel over the bridge in question was in her own lane on the south side of the bridge, or south lane of the bridge.

No. 5. The Court erred in finding as a fact the matters stated in Finding of Fact Number V to the effect that all of the injuries were proximately caused by the negligence of Mary A. O'Keefe.

No. 6. The Court erred in its Conclusion of law Number III to the effect that the injuries to Walter Schoepski, the defendant and cross complainant, were sustained by him as a direct and proximate result of the negligence of Mary A. O'Keefe on the ground and for the reason that this Conclusion of law is entirely erroneous and clearly erroneous under the evidence in the case.

No. 7. The Court erred in its Conclusion of law Number IV on the ground and for the reason to the effect that Walter Schoepski, the defendant and cross complainant, had been damaged by Mary A. O'Keefe's negligence. On the ground and for the reason that the evidence in the case is entirely to the contrary and this Conclusion of law is clearly erroneous under the evidence.

No. 8. The Court erred in its Conclusion of law Number V to the effect that the defendant, Walter Schoepski, was entitled to the relief on the proof of special damages, and under the evidence a finding that Walter Schoepski was entitled to relief at all was contrary to the evidence in the case, and not supported by creditable evidence at all as the question of liability was concerned in the case.

No. 9. The Court erred in refusing to grant plaintiff's motions for amendment of Findings of Fact and Conclusions of Law because each and all of the paragraphs setting forth and requesting the amendment of the findings from page 52 of the Transcript through page 54 of the Transcript demonstrate that each and every one of these requested findings of fact were in accordance with the evidence of the case and should have been adopted by the Court.

No. 10. The Court erred in refusing to grant plaintiffs' motions for a new trial on all of the grounds heretofore stated in connection with the other findings of the Court which have been complained about, and because of the evidence in the case clearly shows that this motion for a new trial should have been granted.

Nos. 11. 12. 13. Points number 11, 12 and 13 all are based upon error in the Court in giving judgment in the three causes of action being considered by this Court, and these errors are based upon the matters heretofore related in its specifications of errors committed by the Court in this case where judgment should, under no circumstances, have been given for the defendant in any one of the three cases.

ARGUMENT

The matter objected to in our Statement of Points number 1 was to have the highway patrolman, Douglas Hardisty, who had investigated over 2,000 accidents and had qualifications away beyond those of many highway patrolmen and who demonstrated by the testimony that he had previously given that he had made a very careful examina

tion of the evidences of the wreck upon the bridge and upon the automobiles in question was in the course of his testimony attempting to give the Court the benefit of his experience and to show where in his opinion the point of the collision between the vehicles involved occurred.

This was a very important point in the case and he was hampered and interfered with in the giving of this testimony and not permitted to relate it nor work it out so that the full benefit of his testimony could have been received in the case, and the Supreme Court of the State of Montana had in a previous case established that an experienced highway patrolman was a qualified witness to testify to similar facts from the evidences that he observed in connection with wrecks of automobiles after they had happened.

In that case of *State vs. Bosch* which is reported in 242 Pacific 2d at page 477, and which is commented on the Court at page 480 of the opinion, and at that time the matter was settled in the State of Montana that this type of evidence was admissible for the purpose and the only question which was presented to the Court was whether or not he would give weight to such testimony; and he should have been permitted to give this testimony without the interference that was demonstrated by the matter which has been objected to and which we say was error on the part of the Court in rejecting the evidence as was done; and particularly with respect to the testimony concerning a condition that existed to the east of the bridge which it will be apparent to this Court, upon reviewing the testimony that he was attempting to tell the Court competent evidence of a fact that existed at the east end of

the bridge that appears in the transcript at the bottom 240 and the top of the page 241, and it is shown by the segments of this testimony that when an automobile was traveling from east to west and didn't make a correction as you came over the brow of the hill to the east that the crown of the road slants from center to the northerly edge and that it was perfectly normal for a driver to correct his driving on that account and to tend to pull or guide his automobile to the left. The matter which he was testifying on was perfectly competent evidence and we were not confined to a hypothetical question because the witness was competent to testify of facts which he himself knew at the time, but the Court commented to the effect that in the first place that we were away off base, that he is now testifying and basing his opinion on something that isn't in the evidence, so lets go back; "if you can't ask him the proper hypothetical question, why it's just too bad. We are not going to have him testify—you better present the proper question to him, or the objection will be sustained. We are not going to let him ramble on. You see, he has already started to talk about something that is not in evidence."

We contend that here this witness was perfectly competent a witness and was one who could testify of this condition to the east end of the bridge and was a part of the consideration which he gave as to the probability that the defendant had guided his automobile over the center line to the south; and we respectfully contend to this Court that the manner in which this testimony went before the Court was such that its effect was destroyed and we were not permitted to present the evidence that we

had on the part of the highway patrolman, which included testimony which he knew of his own knowledge.

State vs. Bosch, 125 Montana 566; 242 Pac. (2d) 477.

Commencing at the bottom of the page 571 Montana Reports and decided in the early part of the year 1952 and this was the law of Montana at the time.

This was also the weight of authority on the subject:

Zelayta vs. Pac. Greyhound Lines, 232 P. (2d) at 579;

Grismore vs. Consolidated Products, 5 N.W. (2d) at 655.

89 C.J.S. Sec. 577 page 353 et seq.

Shopiro vs. Shopiro, Cal. 153 P. (2d) 62.

“Impatience and petulancy on the part of the trial judge do not create an atmosphere conducive of the best efforts of the participants in a trial. They stifle the advocates confidence that he is striving before an open-minded jurist; they intimidate the lay witness; they send away the litigant with the conviction that he has been dealt with unjustly. Withal, the state of mind developed by an impatient arbiter is not the parent of a wise discretion.

Shopiro vs. Shopiro, 153 P. (2d) 62;

Pratt vs. Pratt, 74 Pac. 742;

Chalfin vs. Chalfin, 236 P. (2d) 16.

Thereafter the court made findings that defendant sustained damages in the full amount claimed in the cross-complaint of defendant and an additional sum of \$6,774.67. Tr. pp. 19-48.

Did the plaintiffs have a fair and impartial trial? We believe not.

POINT NO. 2

The Point Number 2. In view of the manner in which the testimony of the highway patrolman was restricted by this evidence, that at the conclusion of the trial at the first hearing, the Court ordered that if there was any rebuttal testimony that it should be put on immediately. There was still one witness whose testimony had to be considered and who was unable to testify at the time. During the interim, the plaintiffs studied the record and observed that the condition to the east of the bridge had not been clearly brought out in the manner that it could have been by witnesses who could have been obtained within a day or two at least. The condition of the record will show that the case was being tried at Havre, Montana. The sheriff of Phillips County resided at Malta, a distance of 90 miles to the east and there was no time to put him upon the stand immediately after the close of the evidence on the part of the defendant, therefore, in the interest of justice and fairness we contend that as long as the evidence had not been permitted on the direct examination at the time that the highway patrolman testified, we should have had the benefit of this testimony on the part of the sheriff, William C. Dove. The matter appears in the Transcript of Record:

"Mr. Alexander: Just a minute, to which we object on the ground and for the reason that it is improper rebuttal that in all events it would call for a conclusion of the witness, it would be incompetent, irrelevant and immaterial."

The Court: Sustained.

Mr. Doepker: Your Honor, we would like to offer the testimony and make an offer of proof here that on the

date of this accident that this witness, Mr. Dove, knows from his own experience with driving down from the knoll of that hill to the bridge and upon the bridge that there was a contour or condition in the highway immediately to the east of the bridge, which would cause cars to follow the contour over to the south of the center of the bridge.

The Court: Well, your offer is denied for a great number of reasons. If it was admissible, it would have been admissible upon your case in chief, and no foundation has been laid for the testimony of the witness for the purpose for which you offer it, so the offer is denied. I don't care to hear any more argument about it.

Mr. Doepker: I am not going to argue it, if it is a question of foundation—

The Court: It is improper rebuttal, it is part of your case in chief.

Mr. Doepker: That is all, your Honor."

We contend that the Court had the power to take additional testimony and that it was better to have the merits of the case presented to him rather than to be unduly concerned with technical problems as to rebuttal and evidence introduced on the case in chief.

Under Rule 59, the Court could, even after judgment, citing Rule 59 a, also *Moore vs. United States*, 59 Federal Supplement 660; *U. S. vs. Colangelo*, 27 F. Supp. 921; *U. S. vs. Parisi*, 27 F. Supp. 922 opened the case for further testimony.

POINTS 3 THROUGH 13

We will argue the remaining points urged together because they all relate to the question as to whether or not

POINT NO. 2

The Point Number 2. In view of the manner in which the testimony of the highway patrolman was restricted by this evidence, that at the conclusion of the trial at the first hearing, the Court ordered that if there was any rebuttal testimony that it should be put on immediately. There was still one witness whose testimony had to be considered and who was unable to testify at the time. During the interim, the plaintiffs studied the record and observed that the condition to the east of the bridge had not been clearly brought out in the manner that it could be by witnesses who could have been obtained within a day or two at least. The condition of the record will show that the case was being tried at Havre, Montana. The sheriff of Phillips County resided at Malta, a distance of 90 miles to the east and there was no time to put him upon the stand immediately after the close of the evidence on the part of the defendant, therefore, in the interest of justice and fairness we contend that as long as the evidence had not been permitted on the direct examination at the time that the highway patrolman testified, we should have had the benefit of this testimony on the part of the sheriff, William C. Dove. The matter appears in the Transcript of Record:

"Mr. Alexander: Just a minute, to which we object on the ground and for the reason that it is improper rebuttal that in all events it would call for a conclusion of the witness, it would be incompetent, irrelevant and immaterial."

The Court: Sustained.

Mr. Doepker: Your Honor, we would like to offer this testimony and make an offer of proof here that on the

date of this accident that this witness, Mr. Dove, knows from his own experience with driving down from the knoll of that hill to the bridge and upon the bridge that there was a contour or condition in the highway immediately to the east of the bridge, which would cause cars to follow the contour over to the south of the center of the bridge.

The Court: Well, your offer is denied for a great number of reasons. If it was admissible, it would have been admissible upon your case in chief, and no foundation has been laid for the testimony of the witness for the purpose for which you offer it, so the offer is denied. I don't care to hear any more argument about it.

Mr. Doepker: I am not going to argue it, if it is a question of foundation—

The Court: It is improper rebuttal, it is part of your case in chief.

Mr. Doepker: That is all, your Honor."

We contend that the Court had the power to take additional testimony and that it was better to have the merits of the case presented to him rather than to be unduly concerned with technical problems as to rebuttal and evidence introduced on the case in chief.

Under Rule 59, the Court could, even after judgment, citing Rule 59 a, also *Moore vs. United States*, 59 Federal Supplement 660; *U. S. vs. Colangelo*, 27 F. Supp. 921; *U. S. vs. Parisi*, 27 F. Supp. 922 opened the case for further testimony.

POINTS 3 THROUGH 13

We will argue the remaining points urged together because they all relate to the question as to whether or not

Mary O'Keefe, the driver of the Buick was responsible for this casualty.

We will honestly and fairly contend to this Court that the evidence which we earnestly say demonstrates that appellants should have had the decisions in this consolidated group of cases shows the decision of the District Court to be clearly erroneous.

As we approach the consideration of the facts involved, let us start with the place where the casualty took place and look at the surroundings so that we may judge the questions of ordinary care and caution on the part of the two drivers involved.

See Exhibits 7 and 8 of Plaintiffs' Exhibit 4.

THE EVIDENCE CONCERNING THE CASUALTY

Raymond O'Keefe:

Raymond O'Keefe a resident of Ontario, Canada, was riding in a Buick '55 Hardtop Four Door which his wife was driving at around 9:00 o'clock slightly over twelve miles easterly from Malta, Montana, (Tr. p. 77) on the morning of August 30th, 1955.

Raymond O'Keefe testifies concerning the incline in the highway to the east of the bridge. (Tr. pp. 80-89.)

They left Havre twenty minutes to seven a. m. (Tr. p. 77). Their children, a boy and a girl were riding in the front seat. (Tr. p. 85.) Mary O'Keefe, his wife, has been driving automobiles for ten or twelve years or more she was 36 years of age on April 17th, 1955, and was driving her own automobile; Raymond O'Keefe was in the rear seat. (Tr. p. 78.)

Mary O'Keefe was driving on U. S. Highway Number 2 and for the last four or five years she had been driving motor vehicles every day, including tractors and trucks. (Tr. p. 78.)

As they traveled eastward that morning Mr. O'Keefe noticed that they had traveled 101 miles and this was somewhere within a mile of the bridge. (Tr. p. 78.) She stayed on her own right hand side and his best judgment of the speed was that she was traveling 40 to 45 miles per hour; she continued on her own or right hand side as she came upon the bridge and went through; she did not swerve away from her own right hand side. (Tr. p. 79.)

Mr. O'Keefe saw an automobile in the immediate vicinity by the bridge coming from the east and it was the car that was in the accident and he did not see any other cars in the immediate vicinity right at that time (Tr. p. 80.)

He saw the car coming down this incline and when it came very close to her it seemed to sway right at her. Mr. O'Keefe raised up in the back seat. (Tr. p. 80.)

Before this car was coming down the incline he did not see it down the highway to the east. (Tr. p. 81.)

Describing his remembrance of the collision he said: "Well as I saw this car coming at us, it seemed to be coming fast and swerved just before it got on top of her." (Tr. p. 82.)

Having memory of the circumstances immediately before the collision, the actual impact or collision took place toward the easterly end of the bridge and in the instant immediately before the collision the Buick car was near the right rail. (Tr. pp. 82 -83.)

The impact between the two cars occurred as the Pontiac hit the front end of the Buick (Tr. p. 83.)

Immediately after the collision the Buick turned in northerly or left hand direction into the ditch or barrow pit. Observing the position of the left front wheel, it was driven upwards and back and the movement of the Buick after the collision followed the crushed position of the front wheel and it came to stop east of the bridge in the barrow pit. (Tr. p. 83.)

Observing the position of the Pontiac right after the collision, it was on the bridge heading to the left at an angle to the south side and the front end was across the center line. (Tr. p. 84.)

Referring back to the time right before the collision Mr. O'Keefe had observed the bridge at quite a distance. Giving an estimate he said it was four or five hundred feet right at that time there was no traffic visible coming from the other direction; as the Buick neared the bridge and when he was roughly forty feet back or so the Pontiac came into sight and he placed it at one hundred feet or so from the bridge on the east side; it appeared to be coming pretty fast. (Tr. p. 90.)

The Buick was traveling eastward at 40 to 45 miles per hour.

(Here we call attention that if the Buick and the Pontiac were traveling toward each other at approximately the same speed the force of an impact between them would be equivalent to the force of 90 miles per hour.)

When Mr. O'Keefe saw the Pontiac a hundred feet from the bridge it was on its own right side of the road and it continued on its right side until it got near or en-

tering the bridge, one of the two, he would say that the Pontiac left its own side of the road as it was coming into the bridge and then it turned right towards the oncoming Buick (Tr. p. 90.)

As Mary O'Keefe entered the bridge she was about a foot from the rail and she seemed to crowd over a little closer to the rail shortly after she entered the bridge; she quite likely saw the other car too. (Tr. p. 91.)

As she crowded over closer to the rail the Pontiac was coming over the center, how far Mr. O'Keefe was unable to tell; the Pontiac came over the center about two-thirds of the way to the east end and Mrs. O'Keefe had come two-thirds of the way in the Buick (Tr. pp. 92-93).

The Pontiac was over at a good angle. (Tr. p. 93.)

Mr. O'Keefe had said that the Pontiac seemed to jump at the Buick like a frog. (Tr. p. 93.)

Mr. O'Keefe's estimates were that the Buick was approaching about 40 feet from the west end of the bridge when the Pontiac was approaching 100 feet from the east end of the bridge. (Tr. pp. 89-90.)

The foregoing testimony of Raymond O'Keefe correctly tells how this unfortunate tragedy happened as is abundantly demonstrated by all the reliable physical evidence in the case.

To substantiate this statement we will review the evidence which shows that Mr. O'Keefe remembered it as it happened.

The survivors of this terrible wreck are and should be in the best position to know what happened.

Mrs. Schoepski does not remember anything at all about it because of retrograde amnesia which she suffered.

Walter Schoepski testified that as he came along the road he observed the 'Narrow Bridge' sign and as he came over the knoll the bridge appeared to be narrow compared with the road; didn't recall that his car had a tendency to pull to the left as he came over the knoll; he tried to stay as close as he could to the north rail that was what he was watching. As he came over the knoll he saw the Buick approaching; he didn't see anything about it that caused him to be concerned and he did not see the Buick off of its lane at any time as he went upon the bridge; and as he was coming on the bridge on one side, the Buick was coming on the bridge on the other side.

No witness would be in better position than Mr. Schoepski to see that the Buick automobile was in its own lane coming on the bridge.

Certainly then there is no dispute about this fact as the two principals, Mr. O'Keefe and Mr. Schoepski agree that such was the fact.

WE CONTEND THAT WITH THE BUICK IN ITS OWN LANE, GOING ON TO THE BRIDGE AT 45 miles per hour, in one second traveled 67 feet into the bridge AND THAT IS TO OR PAST THE POINT OF IMPACT. ALL OF THE RELIABLE EVIDENCE SUSTAINS US ON THIS POINT.

Let us look at the record:

Plaintiffs' exhibit 9, a 3-D Stereo clearly shows that the left front of the Buick automobile is crushed backward from the letter "K" of Buick on the front over the entire left front. This letter "K" would be about 3 inches from the left side.

We contend that this photograph demonstrates a force striking more or less diagonal toward the right side of the Buick. The front of the wheel is pushed backwards and upwards and the front of the right wheel is turned to the left.

Plaintiffs' exhibit 10, a 3-D Stereo confirms that the crushing force was diagonal towards the right side of the Buick.

Plaintiffs' exhibit 8, 3-D Stereo, shows the front of the Pontiac indicating that from the center to the left of the Pontiac there was a direct blow into the Buick. Note the hole to the left and the punched out hole to the right of the center of the front of the Pontiac. This was no sideways blow but a direct blow. It was not hooked and dragged to the left but directly pushed into collision with the Buick. (We will substantiate this later from the testimony of a mechanic who examined the frame of the Pontiac.)

An examination of photos 14 and 15 backs us up in our contention.

As Mr. O'Keefe testified the Pontiac came at the Buick at a good angle.

We contend that the Pontiac was pushed back and to the left as the Buick continued through in the lane that Mr. Schoepski saw it in. After the impact, the driverless Buick scraped its right side along the rail and a portion of the front left side scraped along the front of the Pontiac as it was forced back towards the north rail and lifted so the bumper scraped the top rail at a point 25 feet and 4 inches from the east end of the bridge.

The Buick was literally pushed sideways against the south railing of the bridge as it went through. Plaintiffs' exhibits 11, 12, 13, 14, 15 and 16 prove this beyond question. It will be observed that there was no scraping from the front bumper back to the first of the three holes in the right front fender but a continuous scraping from the first of the three holes back to the rear bumper which unquestionably made the gouge shown in plaintiffs' exhibit Number 7.

If we bear in mind that the Buick was $76\frac{1}{4}$ inches wide as it lay against the railing on the bridge there was more than three feet that the Pontiac extended over into the Buick lane.

We look at picture Number 3 of plaintiffs' exhibit Number 4 and we know from the evidence that the mark shown on the top rail of the north side of the bridge is just west of post number five from the east or 25 feet 6 inches from the east end of the bridge.

We further know from the evidence that the heavy damage on the south rail of the bridge starts at post seven from the east end of the bridge which is approximately 35 feet further west.

It is clearly apparent from the evidence that the Pontiac automobile, after striking the left front end of the Buick automobile, was pushed back and sideways to get it into the position that is shown in the photograph number 3.

Then let us look at photograph number 11 of plaintiffs' exhibit number 4 and by comparing the two pictures, 10 and 11, we can easily visualize how this collision occurred.

The Buick automobile was traveling east in approximately the position of the cab of the wrecker shown in picture number 11 and if we move the Pontiac forward and sidewise to the south it demonstrates exactly, considering the diagram, plaintiffs' exhibit Number 34, how this accident occurred.

The Witness, Mr. Long, testified concerning the condition of the Pontiac which indicates that the Pontiac struck the Buick and was not hooked and pulled outward by the Buick. Testifying to the crease which shows in the top of the Pontiac, he related that the frame on the left hand front corner of the unit was very badly damaged and driven back considerably toward the cowl of the unit. The frame was not broken. It was just badly damaged and bent. The body of the Pontiac was pretty much in line on the left hand side or on the right hand side. However on the left hand corner it was driven back and buckled in next to the body; the whole right hand side of the Pontiac was buckled down more than sideways. (Tr. pp. 299 to 301.)

We get further assistance in our study by using the 3-D slides. See exhibit Number 17 which shows that our contention is correct when we say the Pontiac forced the Buick into the guard rail. The testimony shows that the rear bumper of the Buick cut the second rail of the bridge on the south side in the fashion indicated as the Buick continued eastward in its lane. This mark is made between the sixth and seven posts from the east on the south side of the bridge.

The same situation is shown in plaintiffs' exhibit 7.

Plaintiffs' exhibit 18 is a closeup of the same area showing the paint scraping and the markings extending to the

west at a point 45 feet from the east end of the bridge.

Plaintiffs' exhibit 19 shows a 3-D slide 40 feet from the east end of the bridge.

Plaintiffs' exhibits 20, 21, 22 and 23, 3-D Stereos show that the Buick was pushed against the south rail for a distance of 20 to 45 feet from the east end of the bridge.

The testimony of Sheriff Dove and Patrolman Hardesty clearly demonstrate that the collision took place south of the center of the bridge. There is not one piece of physical evidence indicating that the Buick was north of the center line on the bridge as it traveled eastward.

Reading this testimony, in connection with plaintiff exhibit number 34, shows that Raymond O'Keefe's eyewitness account of the happening of the casualty is exactly what happened.

Mr. Schoepski was certainly not keeping a proper lookout and certainly was not observing where he was driving. He swerved across the center line or center portion of the bridge where he completely failed to keep the Pontiac automobile under control.

Coming over the knoll shown in 3-D Stereo, plaintiff exhibit number 25 and seeing the Buick approaching its own lane about 40 feet west of the bridge, he should have permitted the Buick automobile to pass over the bridge before he entered the same.

The highway was perfectly straight and wide ahead of him and he knew the Buick would reach the bridge first.

Was it because he had been traveling six hours steadily without a break?

Was he too old and never should have made the trip? (Tr. p. 28.)

The physical evidence on the bridge shows conclusively how this accident happened because Mr. Schoepski came over the center line into the south lane and crashed his automobile against the Buick driven by Mary A. O'Keefe.

We have not quoted from the testimony of Pat West the star one hundred per cent quantity witness of the appellee, nor that of Mabel Keough who, we contend, was an honest witness. We ask the Court to study the testimony of these two defense witnesses and it will become completely convincing that Pat West did not tell the truth in the case. He either forgot or deliberately became partisan and testified to impossible things concerning this collision. There is not one line of testimony to the effect that there was any post-collision debris at any place on the north side or north half of the highway except under and to the east of the Pontiac car, indicating beyond question that the collision took place on the south side.

Please study the testimony of patrolman Hardesty, a disinterested highway patrolman with the abundant facts which he observed as he came to investigate the accident demonstrates that he pin-pointed the point where the cars collided. We know definitely from the testimony of Stanley Hould and the highway patrolman that the Buick was lightly touching the south rail from this gouge mark westerly. We say that the witness, Pat West, was testifying from reasoning and observation, such as it was, rather than what he actually saw. He was coming over the knoll of the hill, and trying to pass Mabel Keough's panel laundry truck. She observed the actual collision. He could not have done so. He pulled up beside her and he was not following the Pontiac automobile as he told. A glaring in-

consistency in the testimony of Mrs. Mabel Keough and Pat West demonstrates that with the support which his testimony receives from the other witnesses that arrive at the scene that Pat West was mistaken. We do not contend that he did not aid and assist in removing Mr. and Mrs. Schoepski from the Pontiac car. We contend that he did not pass through the space between the Pontiac and the south rail of the bridge because he could not have done so. Mrs. Keough did not pretend to fix the relative positions of the cars at the place of collision. She testified that the Pontiac entered the bridge on its own side. All witnesses agree that this was a fact—that Mr. Schoepski came upon the bridge on his own side.

After a careful analysis of the law, we submit the following additional cases for the consideration of the Court:

- Morton vs. Mooney, 97 Mont. 1, 33 P. (2d) 26 (Mont.);
- Inkret vs. C. M. St. P. & P. Ry. Co., 107 Mont. 394, 86 Pac. (2d) 12 (Mont.)
- Dahl vs. Spotts, (Cal.) 16 Pac. 100 at 104;
- Market St. Ry. Co. vs. George, 3 Pac. (2d) 41 43 (Cal.);
- Hart vs. Kline, (Nev.) 116 Pac. (2d) 672 at 674;
- Oregon Motor Stages vs. Portland Traction Co. 255 P. (2d) 558 at 561 (Ore.);
- Cameron vs. Goree, 189 P. (2d) 596 at 604 (Ore.);
- Haarstrich vs. Oregon Short Lines R. Co., (Utah) 262 Pac. 100 at 104;
- Poland vs. City of Seattle, (Wash.) 93 P. (2d) 380 at 384.

The above cases say that testimony contrary to physical facts will not support a verdict or a decision of the Court.

based upon testimony contrary to the physical facts.

We respectfully submit that this entire evidence, particularly the physical facts of the case, demonstrate that the Court's decision in this case was clearly erroneous and that the decision should be reversed.

See the following cases that show the recognition of the testimony of the Highway Patrolman as strong testimony based on the physical facts shown by an investigation of a highway accident.

Jackson vs. Vaughn, 204 Ala. 543, 86 So. 469;

Vallejo R. Co. vs. Reed Orchard Co., 169 Cal. 545,
571, 147 P. 238-250;

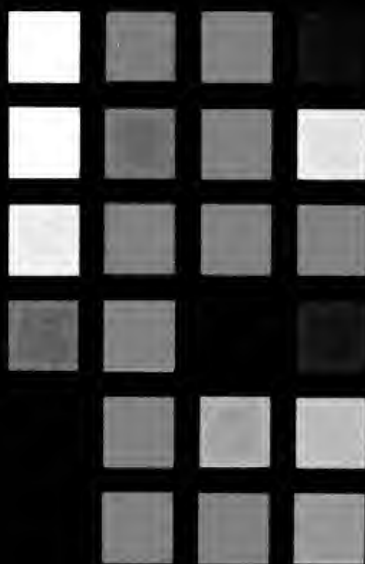
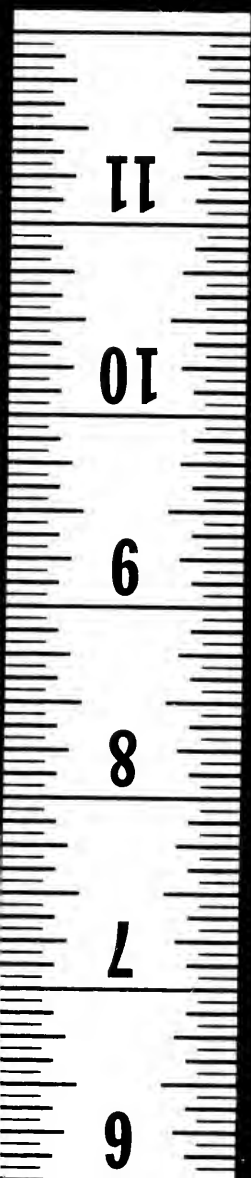
Manney vs. Housing Authority, 79 Cal. App. (2d)
453, 180 P. (2d) 69;

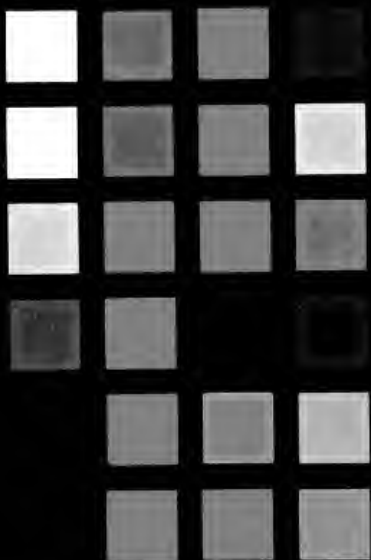
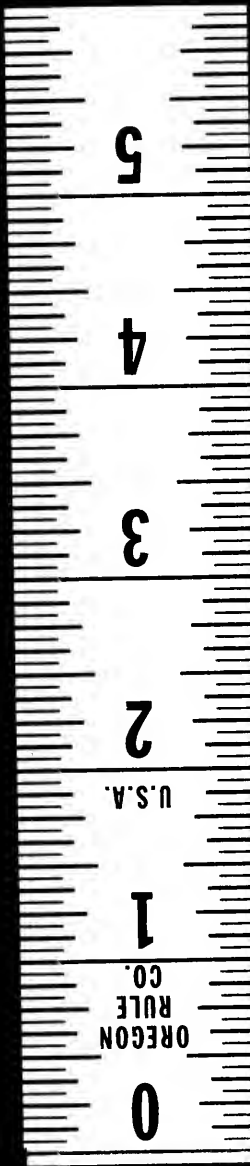
People vs. Haeussler, 260 P. (2d) 13.

Respectfully Submitted
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IN THE
**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

STEPHEN GRANAT, as Administrator of the Estate
of Mary A. O'Keefe, Deceased,

Appellant,

vs.

WALTER SCHOEPSKI,

Appellee.

BRIEF OF APPELLEE

Upon Appeal From the District Court of the United States,
for the District of Montana.

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KUENNING,

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IN THE

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BRIEF OF APPELLEE

Upon Appeal From the District Court of the United States,
for the District of Montana.

HALL, ALEXANDER &
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414 Strain Building,
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Attorneys for Appellee.

STATEMENT OF THE CASE

We agree with the first paragraph of Appellants' statement; however, beyond that it is highly argumentative. We think it would be helpful in understanding the issues on these appeals to note:

As a result of the collision on the bridge, the administrator of Mary O'Keefe, appointed in Montana, brought a representative action on behalf of her heirs (Cause 1798 below) and a survival action for her pain and suffering (Cause 1799 below). Her husband, Raymond O'Keefe, who was in the Buick brought an action for his own personal injuries and damages (Cause 1800 below). These actions were commenced in the State District Court for Phillips County. Walter Schoepski was and is a resident of Wisconsin and removed these three cases on diversity to the United States District Court for the District of Montana, Havre Division. In due course Schoepski answered and counter-claimed for his own personal injuries and damages. The cases were by agreement consolidated for trial. No jury was demanded and the actions were tried by District Judge W. D. Murray.

On the trial the plaintiffs, and appellants here, relied upon the testimony of Raymond O'Keefe to the general effect that Schoepski was travelling at a high rate of speed, that Mary O'Keefe was at all times on her own side of the bridge, travelling about 40-45 miles per hour and had traversed two-thirds of the length of the bridge when Schoepski turned his Pontiac sharply across the center into the path of the Buick. This testimony was bolstered by the opinion of Douglas Hardesty, the investigating State Highway Patrolman, who came upon the scene about an hour after the collision. Large number of photographs and colored stereos were introduced. Some were taken about an hour after the collision, after the Pontiac had been skidded over; some months later. From

the Highway Patrolman's measurements and observations it was his opinion that the point of impact was on the O'Keefe side of the bridge.

On the other hand, Walter Schoepski testified that he was proceeding about 40 miles per hour, he was aware that the Buick was on the bridge and was "hugging" the north rail with his eye on the rail so that he didn't actually see the Buick strike his automobile. He was sure that he continued in a straight line on his own side until struck.

Mabel Keough, the driver of a laundry panel truck out of Glasgow was behind the Pontiac and from her vantage point on the slope leading down to the bridge testified that the Pontiac was on its own right hand side and continued in a straight line until struck. She then saw the Buick sway to the south rail and then swerve across the road into the borrow pit on the north side.

Pat West, a lumberman from Saco, was on his way to Malta and behind the Pontiac as it entered the bridge. The Pontiac was at all times on its own right side until it was struck by the Buick. The Pontiac was stopped dead by the collision and then its front end was spun to the south while the rear end was lodged against the north rail of the bridge. After the impact the Buick slammed into the south rail, came toward him to the east end of the bridge, and then swerved in front of him, so that he had to brake very hard to avoid collision, across the road into the borrow pit on the north.

After extensive argument in written briefs the Court found that Walter Schoepski had been exercising due

care on his own side of the bridge and that the Buick was on the wrong side. Accordingly, the three plaintiffs' claims were dismissed and Walter Schoepski had judgment on his counter-claim against the administrator for the driver of the Buick. The judgment was satisfied before the appeals in the two administrator's cases were taken.

SUMMARY OF ARGUMENT

- I. The Court made no ruling or decision with respect to the testimony of Highway Patrolman, Douglas Hardesty—for what it was worth his opinion as to the point of impact was heard. There was no error and certainly no prejudice in the trial Judge's confining Hardesty to facts and observations instead permitting him to speculate and guess that Walter Schoepski might have been affected in his driving by the slope of the road east of the bridge.
- II. There was no error in refusing the offered testimony of Sheriff Dove as to some experience of his with reference to the condition east of the bridge.

A. The testimony was offered at a session some two months after the main trial, held for the sole purpose of taking the testimony of Witness Keough (who was unavailable because of the impending birth of her child at the time of trial) and rebuttal thereto. Dove's testimony did not rebut Mrs. Keough.

B. No foundation was laid for Dove's experience in approaching this bridge from the east because it was not shown that the speed, type of automobile or skill of the driver was even similar to the

Schoepski case. Furthermore, the individual experience of others is generally held incompetent in cases of this kind.

C. Appellants and plaintiffs were not prejudiced because it is conceded that Schoepski at least entered upon the bridge on his own side.

III. With respect to the trial Court's findings of fact:

A. The function of this Court begins and ends when substantial evidence appears to support the lower Court directly or by inference.

B. The Buick had as a matter of law, no preference or "right of way" although it may have been first on the bridge.

C. Reasonable minds just cannot say that the Court's finding that the Buick was on the wrong side of the bridge is not fully supported by the testimony of Walter Schoepski, Pat West and Mabel Keough—the latter two wholly disinterested eye-witnesses to the collision in question.

Credibility of witnesses is a matter for the Trial Court.

All of appellant's contentions fall with that crucial finding of fact.

None of the cases cited broadside by appellant are persuasive.

IV. No complaint can now be made of the award of damages to Walter Schoepski for the appellant affected has complied with the judgment and it has been satisfied of record.

ARGUMENT

I.

The Examination of the Highway Patrolman, Douglas Hardesty.

(Appellants' Point 1)

Appellants' first specification of error is that the Court committed reversible and prejudicial error "in its rulings, comments and decisions" in the course of the examination of this witness.

At the outset it should be made clear that the Court made no "ruling" or "decision" which excluded or otherwise barred the patrolman's opinion testimony as to the point of impact. The highway patrolman came to the accident scene at "10:25 by my watch" (Tr. p. 228). This was at least an hour after the accident. He testified as to the position of the vehicles, the damage to the bridge, the appearance of the roadway and the measurements which he took. He was asked his opinion as to the point of impact and after objection and some backing and filling on the part of appellants' counsel was permitted to give and did give the opinion that the collision took place "near the front portion of this Pontiac" and "south of the center portion of this highway, as I have concluded from what I saw there" (Tr. p. 243). On cross-examination the effect of this opinion was destroyed when the patrolman conceded that if the Buick were on the wrong side of the road, as appellee's two eye-witnesses testified, and made a right turn to avoid a head-on collision, then the damage would be the same and "you could have this same result" (Tr. p. 247). After the examination by the par

ties, the Court asked a number of questions the effect of which was that in the officer's opinion the Pontiac had been "driven back and sidewise" and "the Buick must have been travelling with greater force than the other car and it tore on through after connecting here solid enough to damage the front ends as it did, and this car (Pontiac) spun relatively in its same position after the impact, but the other car went eighty feet beyond there." (Tr. pp. 261-263). Again the officer fixed the place of impact in his opinion. (Tr. p. 262).

Even after reading the appellants' brief on the point we are at a loss to understand just what error the trial Court is charged with committing. The use of italics at pages 50 and 51 of the brief would indicate that counsel takes exception to the comment or colloquy made by the Court when objection was made to patrolman Hardesty's attempt to include as the basis for his opinion (which the Court was permitting) his conjecture or speculation as to the effect on the Pontiac of a condition east of the bridge (not therefore covered by the evidence) such that "it is perfectly normal for you to correct. . . ." Defense counsel started to interpose objection and the impartial expert just couldn't wait to get in his lick: "Well, if you don't want to hit the bridge, now, let's put it that way." Here the Court interposed: "Well in the first place, we are away off base. He is now testifying and basing his opinion on something that isn't in evidence, so let's go back, etc." (Tr. pp. 240-241).

No offer of proof was made, then or later. Obviously, the effect of the crown or slant of the road would depend

upon the speed of a particular automobile, its roadability characteristics and the ability of its driver. No suggestion was made as to when Hardesty had driven this road or that he had ever driven toward the bridge from the east in a 1952 Pontiac at a speed of under forty miles per hour (as all witnesses agree) or any other speed. Whatever Hardesty's qualifications as a traffic investigator it is clear that his speculation as to what was "perfectly normal" for Walter Schoepski, in his Pontiac and at his speed on the morning of August 30, 1955 is and was entirely incompetent.

Instead of going back, as the Court suggested, or making an offer of proof, Counsel for appellants immediately plunged right ahead on his own tack as follows:

"Q. Well, are there any *facts* that you have not related about this accident that is required for you to arrive at your conclusion of the place that this accident happened on the bridge?

"A. No, sir, *this portion back here is my own idea.*"

On page 59 of appellants' brief are cited a number of cases going to the proposition the opinion evidence of a traffic officer is admissible as to the point of impact in an automobile collision. As noted at the outset, officer Hardesty was permitted to and did give his opinion in this case—it was not excluded.

Reliance is placed on the Montana decision in *State v. Bosch*, which is reported in 125 Mont. 566, 242 Pac. (2d) 977. In that case a sharply divided Court held that a Montana highway patrolman, who had himself observed the lights of the defendant's automobile, was permitted

to estimate speed from his observation, measured skid marks 181 feet long and the tables furnished by the Northwestern Traffic Institute. The relation of skid marks to speed is, of course, a fairly well developed science. That is a far different thing from testifying how and where a collision took place. This case is much more comparable to *State v. Bast*, 116 Mont. 327, 151 Pac. (2d) 1009, where the Court said:

“Blake . . . over objection, testified that from his observation of the road and the car after his arrival on the scene, he was led to ‘believe that a car would have to be travelling close to fifty miles an hour to cover this ground and cause the damage it did to this car.’

“As before stated, Patrolman Blake did not witness the happening of the accident for at the time it occurred he was at his home in Kalispell some 10 or more miles distant and he certainly did not qualify to testify with any degree of accuracy as to the miles per hour the car was travelling some forty or fifty minutes before he came into the picture. Such guess work, speculation and conjecture *cannot be said to rise to the dignity of evidence* on which to sustain a conviction.” (Italics ours).

The basic rule covering the admissability of opinion evidence in the State of Montana is fully discussed in *DeMarais v. Johnson*, 90 Mont. 366, 3 Pac. (2d) 283, where it is said:

“The general rule is that a witness must state facts, and not opinions or conclusions. An exception to this rule, based upon necessity, exists where the witness possesses special skill or knowledge of the subject-matter, and where the facts are such that inexperienced persons are likely to prove incapable of forming a correct judgment without the assistance of the opinion of such witness. See note in 51 L. R. A. (N. S.) 566.

The exception is contained in our statutes (subdivision 9, § 10531, Rev. Codes 1921) and has been recognized by this Court in proper cases.”

(The statute referred to by the Court above is now Section 93-401-27, subd. 9, R. C. M. of 1947.)

Applying the same basic test the Supreme Court of Minnesota has refused the opinion testimony of a deputy sheriff and highway patrolman (both admittedly qualified as experts) as to the cause, place of accident and speed of two colliding vehicles.

Beckman v. Schroeder.

(Minn.) 28 N. W. (2d) 629.

In *Hamre v. Conger* (S. Ct., Mo.), 209 S. W. (2d) 242, the trial Court granted a new trial and that was affirmed because of prejudicial error in admitting the opinion testimony of David E. Harrison, a member of the highway patrol, as to the “point of impact” based upon the location of debris and the conclusion that the point of impact was the center of the debris.

The Court adhered to the fundamental rule that opinion evidence “should never be admitted unless it is clear that the jurors themselves are not capable, from want of experience or knowledge of the subject, to draw correct conclusions from the facts proved.” The Court observed:

“That the center of the *debris* falling from two motor vehicles upon impact may not be substantial evidence of the *point* of impact is, we think, in effect, ruled in *Schoen v. Plaza Express Co. et al.*, Mo. Sup., 206 S. W. 2d 536, loc. cit. 539. There, as here, the collision of two motor vehicles was involved and the point of impact was in issue, and the location of the debris was a circumstance for consideration in determining the

point of impact. In the Schoen case the Court said: "Regardless of the position of defendants' vehicle with reference to the east side of the highway when the collision occurred, it would be reasonable to suppose the loosened parts and fragments of the damaged vehicles would be cast to the westward; yet, it could not be stated with reasonable certainty that this would be so in every such situation. The vehicles being of different weight and size; traveling, no doubt, at different speed; and colliding with great force and at an unknown angle—it would be impossible to reason out or mathematically determine just where the broken-off parts would be cast."

"Whatever value the *location* of the debris or the *center* of the debris falling from two motor vehicles upon impact may have upon determining the point of impact is not, in our opinion, a proper subject for expert or opinion evidence. In this age of motor vehicles, knowledge upon such subject is not something not possessed by the ordinary person, hence the opinion evidence of Patrolman Harrison was incompetent, since it invaded the province of the jury."

249 S. W. (2d) 242 at 248.

Such is the rule generally:

Goodrich v. May, (Ore), 255 Pac. 465; Johnston vs. Peairs, (Cal. App.), 3 Pac. (2d) 617; Blash., Cyc. of Auto Law and Prac., Vol. 9 C, Par. 6311 and 6312.

The *Zelayeta* case cited on page 59 of appellants brief (232 Pac. (2d) 579) as the "weight of authority on the subject" does not hold that opinion as to the point of impact was admissable. All it does hold is that, under the circumstances there involved, admission of such opinion was not reversible or prejudicial error.

The case does have some bearing here; for, it does

show that Judge Murray was doing nothing unusual here when he insisted that the highway patrolman's opinion be confined to what he saw and observed and not based on conjectures and speculations. We invite the Court's attention to the limitations firmly imposed by the trial judge in *Zelayeta* at page 576 of the Pacific Reporter.

Without pausing for breath or changing the paragraph appellants' counsel goes from the cases on opinion testimony into "impatience and petulancy" on the part of the trial judge. The case cited, quoted and principally relied upon is *Shopiro v. Shopiro*, a divorce case, involving a lengthy colloquy between counsel and the trial judge where attorneys fees to respondent were raised from an announced \$5,000.00 to \$7,500.00 because appellants counsel tried to be heard and would not stipulate. We respectfully urge this Court to read the *Shopiro* opinion, particularly at pages 64 and 65 of 153 Pac. (2d) and respectfully suggest that when it is compared with the matter complained of here, in italics, (Appellants' Brief p. 51, Tr. p. 241) the mere citation of the Shopiro case is misleading, unbecoming of an attorney of this Court and at least disrespectful.

The *Pratt* case is almost equally inappropriate and the *Chalfin* case is not reported in 236 Pac. (2d) at page 16, or elsewhere in that volume.

II.

The Testimony of Sheriff Dove Offered in Rebuttal. (Appellants' Point 2).

The contention is that the Court committed reversible error in refusing to permit the rebuttal testimony of

Sheriff Dove respecting a condition of the road east of the bridge which caused motorists to be pulled toward the center of the bridge when driving from the east, westerly, on the highway.

A. THE OFFERED TESTIMONY WAS NOT "REBUTTAL."

To say that the offered testimony was "rebuttal" is a misnomer. When the case was set for trial it was found that an important witness for the defense was about to have a baby and could not testify. Appropriate motions were made and the Court concluded that the main part of the trial would proceed and the case held open until Mrs. Keough's testimony could be obtained. (Tr. p. 76). The trial proceeded from Thursday, October 25, 1956 through Monday, October 29, 1956. The appellants and plaintiffs rested on Saturday, October 27th (Tr. p. 69). The defendants case, in addition to the witness West who had been called out of order on Saturday, continued on Monday. After the testimony of Dr. McKenzie, the defendant rested except for the testimony of Mrs. Keough (Tr. p. 297) and plaintiff proceeded with rebuttal. Raymond O'Keefe testified as the only witness on rebuttal and the following transpired:

"Court: Any further?

"Mr. Doecker: That is it, with the reservation—

"Court: With the reservation to rebut anything new that the witness, Mrs. Keough may present. Well, that's fine. I suppose that we can take the testimony on the 6th of December, but we will have to arrange that date as we find out what the situation is with reference to the birth of her baby, I suppose."

(Court Reporter's Transcript, p. 584, ll. 6-14).

The above seems to have been lost in the shuffle when the record here was printed. It was designated for the record by Paragraph 5 (c) of Appellee's Designation of Additional Contents of Record. The same appears in substance in the Court minutes (Tr. p. 71).

The basis of the defense was fully revealed when the eye-witness, Pat West, was called out of order on Saturday. Thereafter, Sheriff Dove was called in the plaintiffs' case in chief (Tr. p. 68 and p. 213) and was examined at length as to what he did — no mention was made of any condition east of the bridge. Then Douglas Hardesty was called, also on Saturday (Tr. p. 68), when he did testify as to the condition east of the bridge. Now we find in Appellants' brief this remarkable statement:

"The condition of the record will show that the case was being tried at Havre, Montana. The sheriff of Phillips County resided at Malta, a distance of 90 miles to the east and there was no time to put him upon the stand immediately after the close of the evidence on the part of the defendant, therefore, in the interest of justice and fairness we contend that as long as the evidence had not been permitted on the direct examination at the time that the highway patrolman testified, we should have had the benefit of this testimony on the part of the sheriff, William C. Dove."

(Appellants' Brief, p. 60)

We can not point to the record to say where Sheriff Dove was when it came time for plaintiffs' rebuttal on Monday but certainly counsel had all day Sunday to have brought Dove into Havre—if counsel was not satisfied with Hardesty's testimony on the point.

Neither can counsel say that he was at all mislead as

to the limitations on rebuttal when Mrs. Keough's testimony was received on January 14, 1957. When counsel had concluded his cross-examination, he asked if Mrs. Keough (the appellee's witness) might be excused. Thereupon, appellee's counsel inquired if there was to be any rebuttal and counsel indicated one short witness "on the position of the cars". It was suggested that this would violate the Court's order and the following transpired:

"The Court: Yes, I thought all the rebuttal and everything was in except for the testimony of this witness and any rebuttal that was necessary as a result of her testimony. *Is that it?*"

Mr. Koepker: *That is what this is, your Honor.*

The Court: Very well, call the witness." (Italics ours).

(Tr. p. 322).

Thus, counsel acquiesced in the previous understanding and we submit that Dove's offered testimony as to a condition east of the bridge was quite obviously not germane to any part of Mrs. Keough's testimony. If the offer had been sufficient and the evidence competent, it is true that the trial judge *in his discretion* might have relaxed the procedure, but, no doubt had in mind the practical difficulties and delay attendant upon re-opening the entire case.

B. THE OFFER WAS NOT SUFFICIENT TO SHOW THE EVIDENCE ADMISSABLE.

Even if the experience of others in approaching this bridge might have been admissible under some circumstances, it is plain that no foundation has been laid until it be shown that the conditions and management

of the cars was substantially the same. Illustrative of the point is *Williams v. Holbrook* (Mass.) 103 N. E. 633 which was an action for the death of a boy standing on a sidewalk and struck by a skidding automobile.

"The plaintiffs expert, having testified in cross-examination that from his experience in the same street after skidding began it could not be stopped, was asked if he had not 'seen other light machines skid at the place where the accident occurred.' It was discretionery with the presiding judge whether this evidence should be admitted, and its exclusion shows no reversible error (citing cases). Proof moreover that similar cars had skidded did not show their conditions of management, which, of course, were material if such evidence was to have any probative value. *French vs. Sabin*, 202 Mass. 240, 88 N. E. 845."

That such evidence is not competent at all is held in *McKerall vs. St. Louis—San Francisco Ry. Co.* (Ct. of A., Mo.) 257 S. W. 166. That case involved a train striking the automobile in which plaintiff was riding at a crossing. The Court held:

"The evidence complained of related to the experience that others had had in passing over this crossing. . . . (Evidence as to condition of the crossing was admissible since negligence in its maintenance was charged).

"But we do not believe that the individual experience of others, in different automobiles and of different makes is competent. There is too much difference, we think, in automobiles, and the skill of drivers to make individual experience competent."

C. IN ALL EVENTS APPELLEE WAS NOT PREJUDICED.

The evidence as to the condition of the road east of the bridge was designed to give rise to an inference that Walter Schroepski might have gotten on the wrong side

when he made the "correction" to enter the bridge. The issue here, of course, is not what might have happened but what did happen. As will be discussed in the following section, two eye-witnesses, Mabel Keough and Pat West, both in a position to see and know, testified that from their observation Walter Schoepski's Pontiac entered the bridge on its own right hand side and continued on that side in a straight course. The alleged condition of the highway was *east* of the bridge and if it had any effect on the Pontiac it would have been *east* of the bridge or as it entered the bridge. Counsel for Appellant concedes that this did not happen for at page 72 of Appellant's brief it is said:

"Mrs. Keough did not pretend to fix the relative positions of the cars at the place of collision. She testified that the Pontiac entered the bridge on its own side. All witnesses agree that this was a fact — that Mr. Schoepski came upon the bridge on his own side."

We submit that all of the complaining concerning Dove's belatedly offered testimony is a "tempest in a teapot" for the condition to the east clearly didn't have anything to do with the admitted operation of the Schoepski automobile.

III.

There Is at Most a Conflict in the Evidence and the Findings and Judgment of the Trial Court Are Not "Clearly Erroneous."

(Appellants' Points 3-6 and 9-13).

Reduced to essence the trial Court here found that Walter Schoepski was proceeding on his own right hand side of the bridge, without negligence on his part, when

he was struck by the O'Keefe Buick. Appellant contends that the trial Court should have found that the O'Keefe Buick was on its own side of the bridge when it was struck by the Schoepski Pontiac.

A. THE RULE APPLICABLE TO THIS REVIEW.

We take it to be settled beyond all dispute that on appeal this Court will not try this case *de novo* or substitute its judgment on the facts where on conflicting evidence it can not be said that the trial Judge, with his superior opportunity to judge credibility, is not clearly erroneous. In applying Rule 52(a) of the Federal Rules of Civil Procedure, this Court has said:

"Much has been written as to the proper construction of Rule 52(a) of the Federal Rules of Civil Procedure, but we think its application to the instant case is clear. The rule does not disturb the long followed principle that the judge or jury which has seen and heard the witnesses is better qualified to weigh their testimony than is a reviewing tribunal and that findings of fact of the trial body will not be set aside unless clearly erroneous."

Western Union Teleg. Co. v. Bromberg, (C.C.A. 9)
143 Fed. (2d) 288, 290.

"A presumption of correctness attaches to the findings of the District Court. *United States v. Foster*, 9 Cir., 1941, 123 F. 2d 32, and under Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.A., the trial judge's findings of fact will not be set aside unless clearly erroneous. The rule applicable here in the light of the conflicting character of the evidence in the record before us has been aptly stated in *Federal Savings & Loan Ins. Corp. v. First Nat. Bank, Liberty, Mo.*, 8 Cir., 164 F. 2d 929, 932, in this language:

"We are not at liberty to substitute our judgment for that of the trial court and on appeal that view

of the evidence must be taken which is most favorable to the prevailing party, and, if, when so viewed, the findings are supported by substantial competent evidence they should be sustained'."

Paramount Pest Control Service v. Brewer (C.A. 9) 177 Fed. (2d) 564, 567.

To the same effect:

Wingate v. Bercut (C.C.A. 9) 146 Fed. (2d) 725;
Penn. v. Commissioner (C.A. 9) 219 Fed. (2d) 19;
United States v. Marshall (C.A. 9) 230 Fed. (2d) 183.

B. THE BUICK HAD NO PREFERENCE OR "RIGHT-OF-WAY" ON THE BRIDGE.

At page 70 of Appellant's Brief it is argued:

"Coming over the knoll shown in 3-D Stereo, plaintiff's exhibit number 25 and seeing the Buick approaching in its own lane about 40 feet west of the bridge, he should have permitted the Buick automobile to pass over the bridge before he entered the same."

Compare also Plaintiff's Proposed Finding of Fact 6 d., (Tr. p. 29) to the same effect.

The traffic laws of the State of Montana imposed no duty on either driver to refrain from entering this bridge and our statutes may be searched from beginning to end without finding any preference or right of way applicable.

Where, as here, the bridge would permit the passage of two meeting vehicles the applicable rule would be prescribed by Section 32-2151, R.C.M. of 1947, as amended by Sec. 48, Ch. 263, L. 1955, to the effect that upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, and Section 32-2152, which provides as follows:

"Passing vehicles proceeding in opposite directions. Drivers of vehicles proceeding in opposite directions shall pass each other to the right, and upon roadways having width for not more than one (1) line of traffic in each direction each driver shall give to the other at least one-half ($\frac{1}{2}$) of the main-traveled portion of the roadway as nearly as possible.'

32-2152, R.C.M. 1947, as amended by Sec. 49, Ch. 263, L. 1955.

There is in Montana no specific speed limit applicable to bridges or similar structures. The rule of "reasonable care under the conditions then and there existing" as enunciated by the following statute would be applicable:

"Speed restrictions—basic rule. (a) Every person operating or driving a vehicle of any character on a public highway of this state shall drive the same in a careful and prudent manner, and at a rate of speed no greater than is reasonable and proper under the conditions existing at the point of operation, taking into account amount and character of traffic, condition of brakes, weight of vehicle, grade and width of highway, condition of surface, and freedom of obstruction to view ahead, and so as not to unduly or unreasonably endanger the life, limb, property, or other rights of any person entitled to the use of the street or highway. * * *

"(c) The driver of every vehicle shall, consistent with the requirements of paragraph (a), *drive at an appropriate reduced speed* when approaching and crossing an intersection or railway grade crossing, when approaching and going around a curve, when approaching a hill crest, *when traveling upon any narrow* or winding roadway, and when *special hazard exists* with respect to pedestrians or other traffic or by reason of weather or highway condition." (Italics ours).

32-2144, R.C.M. (En. Sec. 41, Ch. 263, L. 1955).

Thus, under the law of Montana, Walter Schoepski

had every right to enter upon that bridge as he did and he had every right to assume that his half of the way would be clear. There were only two real questions so far as responsibility for this horrible collision were concerned, to-wit:

(a) Who failed to drive at an appropriate reduced speed as commanded by the statute and common sense?

(b) Who failed to drive on the right hand side of the roadway?

C. COMPETENT, CREDIBLE EVIDENCE BY WITNESSES IN A POSITION TO SEE AND KNOW CLEARLY SUPPORT THE TRIAL COURT'S FINDING.

The whole fabric of appellants' contentions must stand or fall upon the sustainability of the Trial Court's Finding of Fact III (Tr. pp. 42 and 43). If that finding is sustainable the conclusions of law based thereon, the Court's refusal to amend and the separate judgments in the three cases consolidated for trial *must* stand. Appellants' brief contains no argument to the contrary.

The whole finding should be examined, but the crucial portion thereof is as follows:

"... that the bridge was of sufficient width for the automobiles to pass each other safely; that the defendant and cross-complainant was operating his automobile on said bridge at the time of the collision aforesaid in a careful and prudent manner and on his own side of the road; that the said Mary A. O'Keefe, in operating her automobile upon said bridge, negligently crossed over the center line and her said automobile collided with the automobile owned and driven by the defendant and cross-complainant; that the proximate cause of said collision was the negligence of said Mary A. O'Keefe in crossing over the center line of

said highway and into the lane of travel of said defendant and cross-complainant.”

(Tr. p. 43.)

Aside from Raymond O’Keefe, whom the Court did not give credence (Order, denying motions and new trial, Tr. p. 58), the only testimony based upon direct observation of the collision was produced by the defendant and appellee.

While we knew that a man in a green station wagon had been an eye-witness his identity was not known until Vern Kapphan, one of plaintiffs’ witnesses on cross examination, revealed that “the lumber yard man in Saco had a station wagon there.” That man was Pat West who was produced from Outlook, Montana the next day (Tr. pp. 189, 174). On the morning of the accident West left Saco and was driving west toward Malta. Near the top of the hill which slopes down to the bridge he overtook and came up to the Schoepski Pontiac. His whole testimony, both on direct and cross, should be carefully considered (Tr. pp. 174-212) but the following excerpts are enlightening in view of the Court’s finding:

“Q. Were you—did you ever come up upon that vehicle more closely?

A. Yes, just before coming to the bridge.

Q. And just tell us what you saw when you—just before coming to the bridge, or what you did?

A. I was going to pass the Pontiac car that was in front of me.

Q. It was a Pontiac in front of you?

A. Yes. And being over the road before, I remembered that bridge just ahead, and pulled in behind.

Q. And at that time, would you be able to judge the speed of the Pontiac?

A. I was still maintaining my speed—I would imagine 45.

Q. And they were traveling 45, and you were maintaining your speed. What did you do then?

A. I immediately had to start to slow down.

Q. Now, at that time, where was your car with reference to the center line?

A. I pulled in behind the Pontiac at that time.

Q. Where was the Pontiac with reference to the center?

A. They were on the right hand side of the road.

Q. And proceeding in which direction?

A. Westerly direction.

Q. And then what did the Pontiac do?

A. It continued to brake down before it hit the bridge, before it came to the bridge, before it entered the bridge.

Q. And what did you do?

A. I then really had to slow down, I braked down."

(Tr. pp. 175-176).

* * *

"Q. Are you able to estimate the speed of the Buick when you saw it?

A. I would say 60, 65.

Q. And then what happened?

A. They collided on the bridge, and the Buick was thrown up against the guard rail and bounced off and careened across the road immediately in front of my car.

Q. You say the Buick was careened against the guard rail?

- A. Yes, it careened against the guard rail on the right side.
- Q. And then where did it go—the guard rail on the right side.
- A. On the Buick's right side.
- Q. With reference to north and south—
- A. It would be the south side.
- Q. On the south guard rail, and then the Buick proceeded where?
- A. It careened across the road and went into the north borrow pit immediately in front of my car."

(Tr. p. 177).

* * *

- "Q. Now, going back to the place where you came into the bridge when the accident happened, the Pontiac, where was it with reference to the lane of travel you were in?
- A. The Pontiac was on the right side of the road.
- Q. Did it continue that way?
- A. Yes, All while I followed it up until the time it entered the bridge.
- Q. On its own right-hand side of the road?
- A. Yes."

(Tr. p. 187).

Cross examination:

- "Q. And in the collision, they came together on the right hand side of the bridge?
- A. Yes, the car was on the right hand side of the bridge. They didn't both hit in the right hand side.
- Q. Well, let's change it then this way: The right hand side, as far as your side of the highway was concerned, would be the north side?
- A. Yes.

Q. And the Buick, traveling in a proper lane, would be on the south side, wouldn't it?

A. Yes.

Q. All right, then the collision occurred on the north half of the highway on the bridge, is that right?

A. Yes.

Q. And that is as you saw it?

A. Yes.

Q. Now, did the position change in the collision?

A. Yes, the cars were twisted in the road, and the Buick was slammed up against the railing."

(Tr. p. 201-202).

* * *

"Q. So, do I understand that you didn't get the exact position when they came together?

A. I saw the cars as they hit, and the Pontiac was continued on the right hand side of the road.

Q. All right, let's get some cars and see if you can give us an illustration. You take two cars here—we will call the yellow one the Pontiac and the red one the Buick.

A. Yes.

Q. Let's call the line here (indicating) the approximate center line of the bridge, and illustrate for his Honor your recollection of how the cars came together?

A. Well, as they came—this is the bridge (indicating).

Q. Yes, this is the bridge.

A. The Pontiac came in on its side of the road, the right hand side, the north side of the road. As the Buick came in on to the road, the collision was hit here, and the Buick was thrown this way—

Q. Well, let's have the cars come together, please, as near as you can, how did they come together?

A. They must have locked right in here, or in this position because this car was on the right hand side of the road. The accident couldn't have happened that way. I was watching the back of this car. That was the one I was afraid of running into, that was why I was braking down.

Q. I thought you was braking down so the Buick wouldn't run into you?

A. Well, I had to stay out of the way of this Pontiac to start with. That was before the accident."

(Tr. pp. 204-205).

* * *

"Q. And, then, the way you have it illustrated there, they were both on their own side at the time of the collision?

A. No, I say that the Pontiac went on to the bridge on the right hand side of the road—

Q. Yes.

A. And the collision occurred. Now, this car, I wasn't watching where it was going, whether it was over on the wrong side. It must have been to hit the Pontiac, because the Pontiac was on the right hand side of the road.

Q. Coming on the bridge?

The Court: Let me get this straight, what you are saying, that you didn't see the impact, you just saw the car ahead of you?

A. No, I saw the impact, your Honor, yes, but to put the wheels of this car across that road, I couldn't say that because I wasn't watching the line, but I saw the impact, I saw the Buick hit the bridge railing, and that is when it come right around in front of my car.

Q. Well, now, let's get that part of your recollection straight. You say you think that the cars then hit

in such a position that the Buick careened over after the collision—

A. After the collision, the Buick hit the bridge railing.

Q. Then, the collision occurred further down the bridge so that the Buick careened after the accident, is that it?

A. Yes, it hit the bridge after it hit the Pontiac.

Q. After it hit the Pontiac. And then the Pontiac, was the Pontiac driven back towards you?

A. The Pontiac was just lodged in there that way. It twisted in between the Buick and the rail when it hit, and when it hit, it just swooped it around, it spun it in the road.

Q. And the Pontiac was spun after it was struck by the Buick and went in against the guard rail, is that right?

A. Yes.

Q. And the Buick careened off and hit the side of the bridge, is that correct?

A. Yes."

(Tr. pp. 205-206).

The testimony of Pat West, standing alone, would more than support the Finding III of the Trial Judge. But, there was still more, for Mabel Keough was also an eyewitness. She was the driver of a laundry panel truck on her regular pick-up and delivery route from Glasgow to Malta. She came to a stop when she had just started down the hill leading to the bridge. From that vantage point this is what she saw:

"Q. And when you came to a complete stop, where was this light colored car ahead of you?

A. I believe it was approaching the bridge. I don't know if it was on the bridge or approaching it, I cannot remember.

Q. And what can you tell the Court as to where it was with reference to the right or left hand side of the road?

A. Well, it was on the right side of the road.

Q. Did something happen shortly thereafter?

A. Yes, it did.

Q. Will you just tell the Court what happened?

A. Well, the only thing that I can remember that is clear in my mind is I saw the Buick sway and kind of hit the bridge, and then it just swove out and hit into the borrow pit on the north side.

Q. On which side?

A. On the north side of the road.

Q. At that time that the Buick swerved and came across to the north side of the bridge, was the Pontiac on the bridge?

A. Yes.

Q. And where was the Pontiac at that time with reference to its side of the road?

A. It was on its own side."

(Tr. p. 300-301).

* * *

Re-direct:

"Q. Mr. Doepker also showed you this photograph, No. 3 of Plaintiffs' Exhibit 4, I believe it is, do you know how the Pantiac got in the position shown in that photograph?

A. Well, what do you mean?

Q. Well, just before the accident, was the Pontiac facing and pointing in that direction?

A. No, it was going straight.

Q. It was going straight?

A. Yes.

Q. Now, do you know how the front end got turned at the angle shown in the photograph?

A. No.

Q. It wasn't going that way ahead of you?

A. No, as far as I could see, it was on its own side of the road.

Q. And continuing straight ahead?

A. Yes."

(Tr. p. 320).

These two completely disinterested eye-witnesses, square with Walter Schoepski himself:

"I took my foot off the gas and eased on the brake to slow down. I saw an automobile coming from the west towards me, and I continued on after passing that sign. Just where the automobile was that was coming from the west, I have a fair idea. Well, I would say it was about to enter the bridge at the same time that I did, to the best of my knowledge. Well, I knew it was a narrow bridge and I was trying to hug the rail and stay on my own side of the highway because I knew I was on a narrow bridge, on the right side of the highway. I stayed on the right side of the highway. I continued to hug the rail of the bridge which has been identified as the north rail of the bridge. My car didn't sway, my car didn't jump like a frog."

(Tr. p. 285).

Cross examination:

"I don't recall that the car pulled you towards the left as you came down that last drive to the bridge. I would say that the car did not pull me towards the left, and as I was sitting there driving, I was on the left side of the car, and I did not try to make towards the center of the bridge to avoid the north rail; I tried to stay as close as I could to the north rail; that is what I was watching. I wouldn't say that I wanted to

miss the north rail, too, or that I had to turn a little bit to start with to miss the north rail on the highway, and I don't think my car pulled me towards the center approaching the bridge I am talking about."

(Tr. p. 290-291).

Certainly the evidence of any one of the three witnesses above is "substantial" and fully supports the Trial Court's finding. This Court has recently held:

"When a finding is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether, considering the whole record, there is substantial evidence which supports the conclusion reached by the trier of fact. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court."

Fegles Const. Co., Limited et al. v. McLaughlin
Const. Co. (C.A. 9) 205 Fed. (2d) 637, 639.

This Court has consistently held that it will not review questions of "credibility."

Pekovich v. Coughlin,
(C.A. 9) 258 Fed. (2d) 191, 193;

Parker v. Title and Trust Co.,
(C.A. 9) 233 Fed. (2d) 505, 508.

Where a finding involves the credibility of witnesses and is supported by substantial evidence it is conclusive upon appeal.

Overman v. Loesser,
(C.A. 9) 205 Fed. (2d) 521, 524.

In view of the above rules it would seem pointless to winnow and sift through the mass of testimony here to point out:

1. The numerous conflicts, evasions and apparent

falsehoods in the testimony of Raymond O'Keefe which certainly justified the Court in not believing him.

2. That the photographs taken at the scene were taken at least an hour after the accident, after the Pontiac had been skidded to the north and apparently moved back and after several vehicles had passed over the bridge.
3. That because of the movement of the Pontiac and the replacement of loose parts *before* Highway Patrolman Hardesty arrived his opinion was not reliable.

Since the function of this Court must begin and end when it finds substantial evidence supporting the finding, we do not extend this brief by analyzing the whole record to show that reasonable minds could hardly find differently than Judge Murray did.

Appellant cites a number of cases, on page 72 of the brief, in support of the proposition that testimony contrary to the physical facts will not support a verdict or decision. None of the cases are applicable to the situation here. Illustrative of the whole group are the holdings in the Montana cases cited: In the *Morton* Case (33 Pac. (2d) 262), plaintiff ran into the rear of a truck pushing a stalled car in a fog bank. Plaintiff recovered on his testimony that the truck and stalled car were at an angle across the 24 ft. highway blocking the entire traversable portion. The physical evidence showed that plaintiff's auto had squarely struck the rear of the pushing truck which would, of course, have been impossible if the truck

were across the highway at an angle as plaintiff had testified.

In the *Incret Case* (86 Pac. (2d) 12), plaintiff was a passenger in an auto with a frost covered windshield, which ran into the side of a train nearly 2,000 ft. long as the center of the train was passing over a crossing in a well lighted street in the City of Butte. Plaintiff recovered on the testimony of the driver and himself that the rays of light at the crossing formed a "curtain" which the lights of his car could not penetrate and he was thereby prevented from seeing the passing train. The Court said such testimony was so utterly contrary to common sense and everyday experience that it was not worthy of consideration.

A careful reading of all of the other cases cited (on page 72), except *Dahl v. Spotts* which we do not find, reveals that they are all equally inapplicable. Most of them turn on a situation where the testimony of the witness relied upon was *impossible* on the uncontradicted physical facts or inherently unbelievable. Thus, in the *Poland Case* (93 Pac. (2d) 380) the plaintiff testified that she looked but did not see a street car in plain sight; the Court held that she was guilty of contributory negligence in spite of her swearing to the contrary.

We have nothing like the cases cited in this case. The accuracy of important "physical facts" were themselves in dispute (Order on Motions to Amend, etc., Tr. pp. 57-58). Furthermore, appellants' own expert, Hardesty, agreed that if the Buick were on the wrong side of the road "you could have this result" (Tr. p. 247). In other

words, the physical evidence was not incompatible with the eye-witness accounts.

Appellant winds up his brief with the citation of four cases purporting to recognize the testimony of a highway patrolman as "strong testimony." (Appellants' Brief p. 73). An examination of the cases will show that they hold no such thing. The *Jackson Case* (86 So. 469) simply holds that opinion testimony by a qualified witness as to speed based upon skid marks left on dry pavement was admissible. The *Vallejo Case* (147 Pac. 238) was a condemnation case and the *Manney Case* (180 Pac. (2d) 69) involved the cause of a fire. The *Hacussler Case* (260 Pac. (2d) 8) was an appeal from a manslaughter conviction. A highway patrolman who arrived within minutes was permitted to testify as to point of impact but the Court certainly does not say, or even intimate, that such opinion controls all else or was particularly sacrosanct.

Where the facts are like those here, the great weight of authority has been extremely cautious in admitting opinion testimony and even more cautious in giving it, or physical facts, any certain conclusion. Expert testimony reconstructing a collision from physical and mathematical facts is not favored by the Courts.

Moniz v. Betencourt,
(Cal. App.) 76 Pac. (2d) 535, 539;

Linde v. Emmick,
(Cal. App.) 61 Pac. (2d) 338, 343;

Romann v. Bender,
(Minn.) 252 N. W. 80, 82.

One of the cases frequently cited is *Fishman v. Silva*, (Cal. App.) 2 Pac. (2d) 473. That case explains the

reason for the reluctance of the Courts and the language is most appropriate here:

"It is needless to add, as in all such cases, there is presented a wide field for argument, the main theme of which is physical facts and the so-called immutable laws of physics. Contentions based on these foundations are usually not convincing, strange as it may seem, for the simple reason that in partisan presentation there is an ever-present temptation to forget essential facts which do not fit in. For instance, where it is argued that, where there is a contact of two bodies in a given position, the direction of the applied force will control the position of the bodies after the impact, any rule or law, in the abstract, will be found of little value when we have the additional factors of each body in motion and controlled by independent agencies. Experience has shown the futility of attempted demonstration in accident cases; there are too many varying factors. Among these variants we may class indefinite rate of speed, condition of the highway, judgment or lack thereof in the drivers, a direct blow or a glancing one, and the balance or equilibrium of each car at the time of impact."

(2 Pac. (2d) 473, at 474).

IV.

Questions Touching the Award of Damages to Walter Schoepski in Causes 1798 and 1799 Are Moot.

(Appellants' Points 7 and 8).

Complaint is made of the Trial Court's Conclusions of Law IV and V (Tr. pp. 47 and 48) to the effect that Walter Schoepski was entitled to damages on his counter-claims against the Administrator of the Estate of Mary O'Keefe in Causes 1798 and 1799. Judgment was entered accordingly (Tr. p. 51).

The record shows that those judgments were satisfied

on March 12, 1958 (Tr. p. 73-74).

The general rule is that an appeal becomes moot and will usually be dismissed where the judgment has been satisfied or complied with by the appellant.

5 C. J. S. 424, Sec. 1354(6);

Travis County v. Matthews,
(Tex. C. App.) 221 S.W. (2d) 347;

Padgitt v. Young County,
(Tex.) 229 S. W. 459.

There seem to be no cases squarely applicable in Montana, but the following are persuasive:

An appeal from a writ of mandate, subsequently obeyed by the appellant, was dismissed as fictitious.

State v. Napton,
10 Mont. 369, 25 Pac. 1045;

After an appeal from distribution of an estate, appellants executed receipts for their awards satisfying the decree; this deprived the appellate Court of jurisdiction.

In re: Black's Estate,
32 Mont. 51, 79 Pac. 554.

The case of Raymond O'Keefe (Cause 1800 below) of course, falls in a different category; but, certainly it would be a monstrous thing if by some legerdemain or manipulation, both principals to a head-on collision should recover damages from each other.

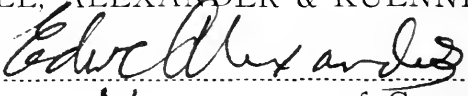
CONCLUSION

We respectfully urge that Appellants' contentions with respect to the taking of evidence are a "grasping at straws" to get some question of law into these appeals. No error was committed by the Court. All other contentions are bottomed in objection to the Court's finding of

fact that the Buick was the vehicle on the wrong side of the bridge. Open minds must agree that the great preponderance of competent, credible evidence supports that finding. Even if it would, this Court cannot go further, draw its own inferences and substitute its findings for those of the Trial Judge. On the record the findings, conclusions and judgments of the Trial Judge are clearly correct and should be affirmed.

Respectfully submitted,

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United States
Court of Appeals
For the Ninth Circuit

STEPHEN GRANAT, as Administrator of the
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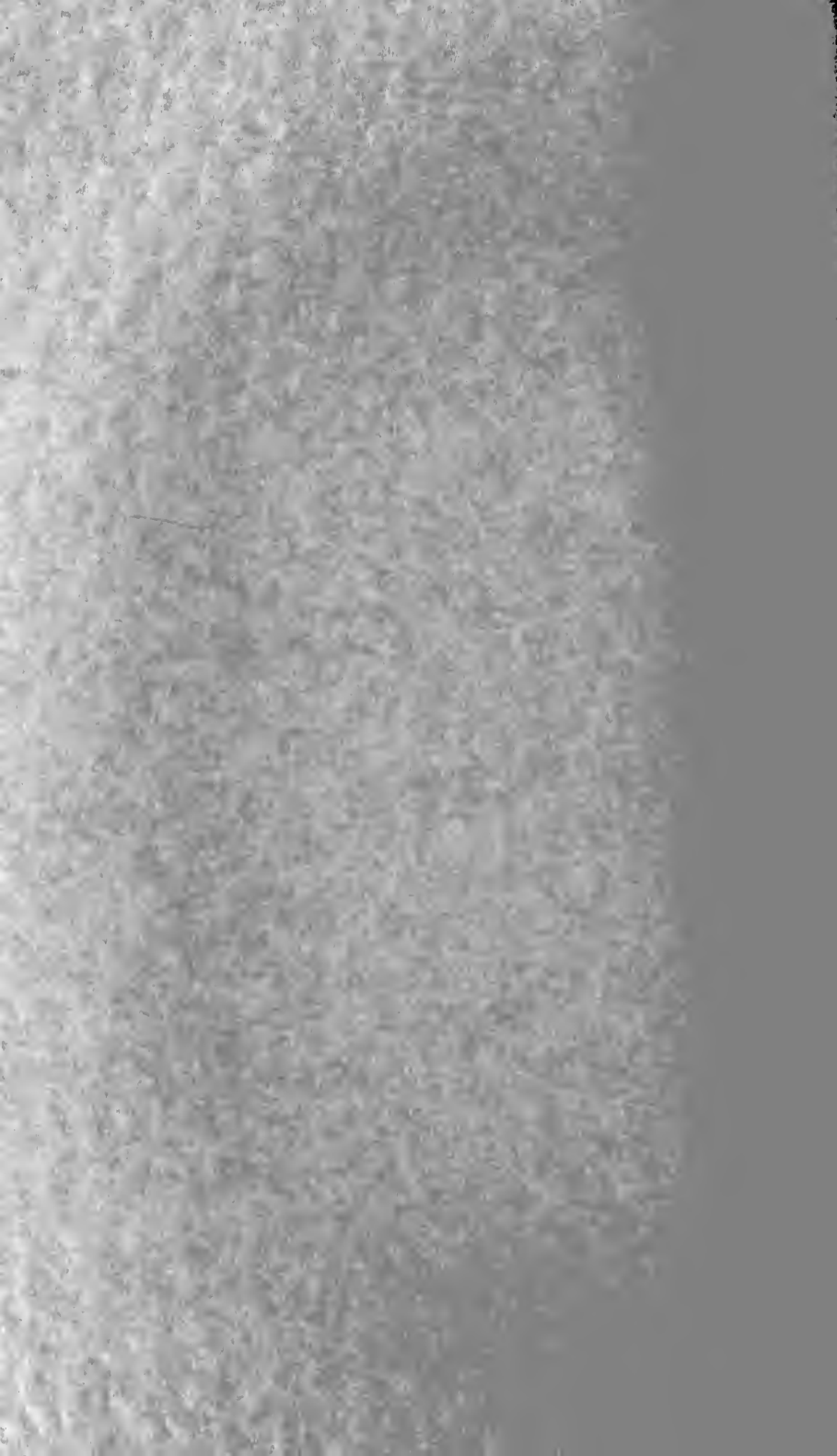
Appellee.

REPLY BRIEF OF APPELLANT

Upon appeal from the District Court of the United States
for the District of Montana.

DOEPKER & HENNESSEY,
Medical Arts Bldg.
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ARGUMENT

Appellants' Reply Brief will be confined to brief references pointing out to the Court that, as was contended for in our original Brief, the rule remains that where the physical evidence is contrary to the testimony of witnesses, the physical evidence controls.

On page 8 of the argument, counsel speak about the effect of destroying the opinion of the Highway Patrolman by assuming certain things that were asked him to the effect that "if the Buick were on the wrong side of the road?"

Later, we will contend that the appellee is bound by the testimony of the appellee, Walter Schoepski, by the evidence which he gave to the effect that the Buick *was not on the wrong side of the road*. So the cross examination as to that part of the argument simply is beside the point—assumption of something contrary to the evidence—because the Buick was not on the north side of the road, and analysis of the testimony of the so called appellee's two eye-witnesses will disclose that neither one of those witnesses testified that they saw the Buick on the wrong side of the road, and that therefore, this argument is not supported by the facts of the case.

CIRCUMSTANCES SHOWING COURT'S DECISION ERRONEOUS

The knoll to the east of the bridge, the crown of the road which necessarily caused the road to slope towards the north from the bridge to the brow of the hill approximately 500 feet to the east; a driver approaching this point for the first time and coming upon the situation of the bridge which appeared to be narrow in the highway; all were reasonable matters to take into consideration in arriving at the fact as to the place upon the bridge where the collision between these two automobiles occurred, (Appellee Brief P. 10) and, regardless of whether it was a Model T Ford or a 1955 Cadillac, the same physical fact applies that in order to avoid the north rail of the bridge, any driver in any car would have a tendency to correct and pull his car to the left, and the only obligation that would be involved in this situation would be the obligation to observe and keep his car under control so that he stayed on his own north side of the bridge going west.

This fact, together with all of the circumstances and physical evidence here which would belie the so called eye-witness observation (of 72/100 of a second), are matters which are unanswerable and which will demonstrate that the so called eye-witness Pat West and his testimony did not rise to the level of competent evidence supporting the court's erroneous decision.

With relation to the cases quoted from on page 18 of Appellee's Brief, we call the court's attention to the fact that the circumstances upon which these cases were decided were entirely different from the case at bar, and the same is true with respect to the experience of others passing over a crossing in one of the cases cited.

This situation, compared to the situation we are concerned with in this case, is entirely inapplicable for the reason that we are dealing here with a condition in the highway which *every driver* would be reasonably certain to conform to a natural impulse, in order to avoid colliding with the north rail of the bridge and would find it necessary to make a correction, because of the contour of the highway, and we contend that it would be immaterial what type of automobile was involved or the speed it was moving, because the situation would be the same in every case.

With relation to Subdivision C on page 18 of the brief, we particularly say to the court that, when it is claimed that the witness Pat West was in a position to see and know what occurred (observation of 72/100 of a second) that an inspection of his testimony compared with that of Mabel Keough will disclose that this is highly questionable and it points almost certainly to the contrary.

Both these witnesses, Mabel Keough and Pat West, are defense witnesses and the irreconcilable testimony of the two is such that it certainly calls for the support of other witnesses for Appellee in this case to support the court's decision.

The testimony of Pat West was entirely unsupported by any other witness at all.

Further, when the question of the position from which the defendant entered upon the bridge is involved, we all start with the same evidence.

There isn't any conflict that he entered upon the bridge on his own side, but when we consider that this terrific impact occurred in the (approximately) east 38 or 40 feet of the bridge and he was driving the Pontiac automobile, of a length as is shown by the evidence, the direction of his approach into the bridge could well be in a straight line starting from the north side, and at the same time going directly across the unmarked center of the bridge into collision with Mary O'Keefe's automobile, and, we contend, that this is exactly what happened.

With respect to the situation contended for on page 20 of Appellee's Brief, we are fully in accord with the statement which counsel make that this court is not going to try a case de novo or substitute its judgment on facts for the judgment of the District Judge who tried the case below unless it appears that the appellee is bound by his testimony which is contrary to the Court's decision or unless the evidence, as a whole, is such that it demonstrates the Court's decision is clearly erroneous. That is the universal rule in the cases cited on page 20 and 21 of his Brief, and we are not in conflict with this rule in any particular.

With respect to a right-of-way for the Buick as argued on page 21 of the Brief, we certainly do not claim that the Buick had a right-of-way on the bridge, but we say that reasonable care, if a motorist traveling west and approaching the bridge observes an automobile coming on the bridge from the west, throws a duty upon such westerly proceeding driver to exercise ordinary care as he enters upon and proceeds across the bridge.

THERE IS NO COMPETENT CREDIBLE EVIDENCE TO SUPPORT COURT'S FINDING

Passing to Subdivision C of Appellee's Brief, we appreciate that we have shown and must show in this case that the court's findings are contrary to the physical facts and the only evidence in the case, that will be persuasive to this court, will be evidence that is not contrary to the physical facts that have been demonstrated here.

APPELLEE BOUND BY HIS OWN TESTIMONY

We appreciate that we have an area involved which is approximately 96 by 19½ feet and that it would be impossible for any motorist, who was exercising care and looking ahead, not to see what was in plain sight and for that reason the testimony of the defendant is absolutely binding upon him because it is ridiculous for appellee to claim that because he was watching the north rail that he could not see the rest of the area of the bridge, because, if he was looking ahead at all, every portion of that bridge in the highway was visible to him and he is bound by the testimony which he gave *that the Buick automobile was not traveling in a negligent manner and was not traveling out of its own lane of traffic.* (Tr. p. 291.)

A note in 80 A. L. R. at page 624 dealing with the conclusiveness of testimony of a party that is favorable to the adverse party, we submit to the court, forecloses the defendant from claiming that the Buick automobile was traveling in the north lane and swerved at an angle across his bow or across the front of his Pontiac automobile, because all of the substantial evidence, photographs and markings on the bridge and debris on the bridge contend to the contrary, but the rule that this testimony of Mr. Schoepski is binding upon him is supported by the cases that are mentioned in the anotation of 80 A. L. R. at page 624 with cases quoted and cited from most of the states of the United States. The rule is foreclosed as far as the State of Montana is concerned as is shown by the following cases:

Casey vs. Northern Pacific Ry. Co., 60 Montana 56, 198 P. 141;

Wilson vs. Blair, 65 Montana 155, 211 P. 289, 27 A. L. R. 1235;

Putnam vs. Putnam, 86 Montana 135, 282 P. 855;

Cullen vs. Peschel, 115 Montana 187, 142 P. (2d) 559.

Note: 169 A. L. R. 798.

WHEN THE DISTRICT COURT FOUND IN
FAVOR OF THE DEFENDANT CONTRARY
TO THIS BINDING EVIDENCE, IT WAS
CLEARLY ERRONEOUS

The gouge mark which was caused by the terrific impact between the two cars was explained in the testimony of the highway patrolman, Officer Hardesty, and it was evident from the place that it was, on the floor of the bridge, and its distance from the sleeper on the south side

of the bridge that the gouge mark was made by a crushed part of the Buick; the debris nowhere else to the west beyond the Pontiac except in the area immediately to the west *on the south side*; the gouge mark demonstrating where the force of the two vehicles came together and caused this part of the Buick to gouge out the floor of the bridge at the point of impact; the light rubbing along the south rail of the bridge by the Buick as it was, demonstrates that the driver of the Buick automobile, Mary O'Keefe, was trying to avoid the oncoming Pontiac as it was passing over the center line of the bridge; the force of the Pontiac crushing the Buick up against the south bridge timbers up over the sleeper, flattening the tires on the Buick on the right side; the absence of any braking mark or any skid marks that would indicate that these vehicles were being manually controlled to place them in a position different to what the normal position would be in this confined area of 19 feet by not to exceed 35 or 36 feet; all these physical facts demonstrate almost to the point of demonstrable evidence that the collision between these two vehicles took place on the south side of the bridge and the testimony of Raymond O'Keefe is substantiated practically throughout.

Studying the evidence of the other witnesses that came upon the scene almost immediately, the testimony of Mabel Keough, supported in many of the material and important facts by the testimony of other witnesses that came upon the scene; the contention that the witness Pat West makes, in his evidence, that he was following the Pontiac and that he was immediately behind it, is completely discredited by the testimony of the driver of the laundry panel, Mabel Keough, and it is difficult for us to see how this testi-

mony that was completely conflicting could be said to be evidence which would support the court's finding in this case; and the physical facts, demonstrating to the point of certainty, that the testimony of this one hundred per cent witness, Pat West, was either deliberately colored or false and that this court in studying this case should carefully look to the record of the testimony of Mabel Keough and Pat West and see that, in many particulars, if the testimony of one was true, the other must necessarily be untrue and false, coupled with the fact that Mabel Keough was supported by the other arrivals at the scene which cannot be said of the witness, Pat West, and we respectfully submit that this is no foundation at all for the court's erroneous finding when we do not ask the court to analyze or try the case *de novo*, but simply to see that the evidence demonstrated at the scene makes the testimony of Pat West unbelievable in many particulars and contrary to established physical facts.

We urge that, when the young lady driving the laundry wagon, Mabel Keough, testified that the car belonging to Pat West was coming up behind her to the east as she reached the brow of the hill, she looked down and saw the accident happen; that he pulled up beside her attempting to pass, dropped back, and then, after she had briefly stopped at the brow of the hill and continued down to the point of the accident, that Pat West in his green station wagon pulled up on the south side of the highway beside her panel truck and stopped, makes us contend respectfully to this court, that the observation of the witness Pat West was such that it could not be the basis of calling him an eyewitness to the accident, although we do not dispute that he arrived shortly after the accident happened.

The quantity of his testimony is one hundred per cent, the quality of the testimony is practically less than zero.

When we know from the circumstances that the entire action took place in about seven tenths of a second, it was certainly marvelous that there was and is a human being who could detail all of the minute details about this collision with the exactness that we demonstrated by the witness Pat West in his testimony in this case, when mathematical calculation discloses that, at best, his observation was confined to the period of 72/100ths of a second; the physical facts are contrary to his testimony, and the testimony of Walter Schoepski disputes him as to the lane the Buick was traveling in on the bridge, we urge that the court's decision was clearly erroneous in this case.

Certainly Pat West could not see through the knoll 500 feet to the east from the bridge; he was not directly behind the Pontiac, as he claimed, *but was following the laundry panel* up the knoll from the east—most certainly reaching the first point of observation of the bridge, after the collision was observed by the witness Mabel Keough. He did not stop on the north side of the road east of the bridge at all, but on the south side thereof. (See testimony of other witnesses arriving at the scene immediately after the accident happened.) He could not have been an eye-witness to the actual collision.

Passing for the moment the hundred per cent quantity of the testimony of the witness Pat West in this case and the discrepancies which appear in his testimony to which he will allude later. What opportunity did Pat West have to see and relate that about which he testified? At 45 miles per hour, an automobile will travel approximately 67 feet in a second. The entire happening of this regrettable

casualty took place in a period not to exceed one second from the time the cars entered the bridge until the collision was over and the cars had arrived at their respective positions after the collision. What he observed in a second while driving his automobile to the first point of possible observation is phenomenal, particularly the accuracy with which he presumes to describe the happening of the accident.

Later we will see that he did not have an opportunity to see the actual happening of the accident at all, unless it was immediately after it happened.

On his direct examination, he testified as follows:

“Q. Now, going back to the place where you came into the bridge when the accident happened, the Pontiac, where was it with reference to the lane of travel you were in?

A. The Pontiac was on the right side of the road.

Q. Did it continue that way?

A. Yes, all while I followed it up until the time it entered the bridge.

Q. On its own right hand side of the road?

A. Yes.”

(Tr. p. 187.)

In his cross examination, the witness West was asked whether or not the front end of the Pontiac was across the lane to the south—showing him a photograph:

“Q. Well, of course, this is a photograph. I want your memory of it, you was on the ground.

A. *There was no line there. I couldn't actually say that the front end of the car was over the line, over the center.*”

(Tr. p. 208.)

At this point, we want to comment that he had at the time been around the Pontiac for a period of 20 to 25 minutes, as we estimate and because there was no center line on the bridge, he was unable to say from his memory that the front end of the Pontiac was over the center line to the south.

Now, compare this situation with his testimony concerning his observation of a second at the most and he purports to place with detail the point of the collision on the north side of the surface of the bridge.

This demonstrates that Pat West was testifying from his reasoning and observation, such as it was, rather than what he actually saw. The Court will recall that on direct examination of Pat West at page 187, he testified that the Pontiac was on its own right hand side of the road and that he followed it up until the time it entered the bridge, but compare this to the supported testimony of Mabel Keough.

It is important to remember here that there is no conflict in the testimony that the Pontiac was on its own right hand side up to the time it entered the bridge because the witness O'Keefe also testifies that it was.

On cross examination, however, we attempted to inquire from the witness where the collision occurred, and it is important to study this part of his testimony. We had him illustrate by the use of two toy autos and as it is backed up by the record, at pages 205-206, he illustrated the two cars coming down each on their own side and the following occurred:

"A. Well, as they came—this is the bridge (indicating)?"

Q. Yes, this is the bridge.

Q. The Pontiac came in on its side of the road, the right hand side, the north side of the road. As the Buick came in on to the road, the collision was hit here, and the Buick was thrown this way—

Q. Well, let's have the cars come together, please, as near as you can, how did they come together?

A. *They must have locked right in here, or in this position because this car was on the right hand side of the road.* The accident couldn't have happened that way. I was watching the back of this car. That was the one I was afraid of running into, that was why I was braking down.

Q. I thought you was braking down so the Buick wouldn't run into you?

A. Well, I had to stay out of the way of this Pontiac to start with. That was before the accident.

Q. All right, then, the collision occurred on the bridge. What is your best judgment of approximately where?

A. Well, I would say the distances on this to the bridge, it was right about in here. Of course, the cars you have got here are a little long—

COURT: Indicating the last third of the bridge?

A. Indicating the last third of the bridge, yes.

Q. And, then, the way you have it illustrated there, they were both on their own side at the time of the collision?

A. No, I say that the Pontiac went on to the bridge on the right hand side of the road.—

Q. Yes.

A. And the collision occurred. *Now, this car, I wasn't watching where it was going, whether it was over on the wrong side. It must have been to hit the Pontiac, because the Pontiac was on the right hand side of the road.*

Q. Let me get this straight, what you are saying, that you didn't see the impact, you just saw the car ahead of you?

A. No, I saw the impact, your Honor, yes, *but to put the wheels of this car across that road, I*

couldn't say that because I wasn't watching the line, but I saw the impact, I saw the Buick hit the bridge railing, and that is when it come right around in front of my car.

Q. Well, now, let's get that part of your recollection straight. You say you think that the cars then hit in such a position that the Buick careened over after the collision—

A. After the collision, the Buick hit the bridge railing.

Q. Then, the collision occurred farther down the bridge so that the Buick careened after the accident, is that it?

A. Yes, it hit the bridge after it hit the Pontiac.

Q. After it hit the Pontiac. And then the Pontiac, was the Pontiac driven back towards you?

A. The Pontiac was just lodged in there that way. It twisted in between the Buick and the rail and when it hit, and when it hit, it just swooped it around, it spun in the road.

Q. And the Pontiac was spun after it was struck by the Buick and went in against the guard rail, is that right?

A. Yes.

Q. And the Buick careened off and hit the side of the bridge, is that correct?

A. Yes."

(Tr. pp. 205-206-207.)

It is important too, in studying his testimony about this important matter, to notice his answer on page 205 where he says: *they must have locked right in here, or in this position because this car was on the right hand side of the road. The accident couldn't have happened that way. I was watching the back of his car. That was the one I was afraid of running into, that was why I was braking down.*

This is evidence that demonstrates that the witness West is testifying from his judgment and not from what he saw. The same thing appears on page 206. It was apparent to the Court that he did not actually see the relative positions of the cars in the accident.

Now, this type of testimony on the very important point as compared in strength to the testimony of the highway patrolman Hardesty, from the evidences upon the ground, is like a comparison of a pigmy to a giant.

Commenting on the testimony of the witness Mabel Keough recorded on page 30 of Appellee's Brief, it is conclusive that this witness did not fix the relative position of the two cars at the point of impact with reference to the unmarked center line of the bridge.

That the Buick swayed when it hit the south bridge railing is certain.

That, after hitting the south rail of the bridge, it came across to the north side of the highway into the barrow pit is certain.

When we consider that the movement of the Pontiac into the south lane, as the physical evidence demonstrates, must have been instantaneous, the physical facts showing the point of the collision to have been in the south lane are the only reliable evidence of the place where the impact occurred.

The eye-witnesses were not in a position to detail these circumstances with exactitude.

REVIEW OF THE PHYSICAL FACTS SHOWN

1. The Buick never left its lane of travel until after the collision when it went driverless off the east end of the bridge circling in to the barrow pit. This is demonstrated by paint scrapings on the south rail of the bridge which started at the fifth bridge post from the west—a 2 foot 10 inch paint scrape; next, 14 feet 1 inch further east a 6 inch paint scrape, and then the gouging and paint scraping easterly from the approximate point of the collision—two posts further east and then in the area testified to by Patrolman Hardesty where the bumper gouge and the scrapings on the bridge indicated that the Pontiac had crushed the Buick car on its left side and forced it into the bridge rail along the area testified to.

2. The collision was confined between the north and south bridge railings. The gouge mark on the floor of the bridge indicating the place where a portion of the Buick was crushed down into the surface of the bridge in the collision.

3. There is an entire absence of any post-collision debris on the north half of the bridge to the west of the Pontiac and place of collision. The post-collision debris being all in the south lane of the bridge except under and beside the Pontiac as it ended up on the bridge after the collision.

4. The position of the gouge mark on the north rail of the bridge near the fifth bridge post from the east, plaintiffs' Photograph 3 of Exhibit 4 shows the gouge mark with relation to the Pontiac after the collision and shows where the rear bumper of the Pontiac rubbed the top rail

in the collision as it was pushed backward and spun around as the cars crushed together as the Buick went through to the east. This was the only marking along the north side of the bridge. See also Photograph 11 of Plaintiffs' Exhibit 4.

5. Both cars left their markings on the bridge and their debris on the bridge demonstrating the area of the collision which was confined to an area of $19\frac{1}{2}$ feet wide by not to exceed 40 feet in length from the east end of the bridge and showing the collision occurred in the south lane.

6. The parts of the automobiles which were picked up and laid at the east end of the bridge shown in Photograph No. 2 of Plaintiffs' Exhibit 4 were taken out of the south lane along with the fender shown in Photograph No. 3 of Plaintiffs' Exhibit 4 to clear the path for the ambulance (See testimony of Vern Kapphan Tr. 118 through 128, with particular reference to page 121).

7. The Pontiac was skidded over just enough to permit the ambulance to go through and the Pontiac was skidded over to the north to clear the south lane for the ambulance.

8. The crushed position of the two cars indicate that they came together practically head-on and not a sliding blow across the bow of the Pontiac, and if the Buick was cutting across as is suggested by Apellee's argument, the Buick would have crashed through the bridge on the south railing instead of leaving its markings along the south rail of the bridge from the fifth post from the west through to the fourth post from the east. The Buick did not cut

from the north lane to the south. The physical evidence demonstrates conclusively to the contrary.

See:

McAlexander vs. Lewis, 93 N W (2d) 632.

REPLY TO SUBVISION 4 OF APPELLEE'S BRIEF

With respect to point 4 of Apellee's Brief, we are familiar with the record that the judgment in one of the cases, being the case where the damages were assessed against the Administrator of the estate of Mary A. O'Keefe, deceased in his capacity as administrator, which, of course, is case number 1799 of the three cases involved was satisfied.

The situation actually in this case was that with the large judgment against the estate of Mary A. O'Keefe, deceased, the liability insurance company stepped in and made a compromise settlement by payment of an amount less than the judgment that was awarded, and we feel that the liability insurance company with their insurance policy being the only asset in the estate of Mary O'Keefe, deceased, was under a considerable pressure with this judgment hanging over them; that the settlement was really compulsory.

The question of whether or not that makes the appeal in 1799 moot is respectfully presented for the consideration of the court under the authority of 5 C. J. S. Section 1354 page 425 and the cases cited under Note 96.

We call attention to the Court, never-the-less, the fact that Stephen Granat, as administrator in the two cases—1798 and 1799—was acting in entirely different capacities, and there could not be, under any circumstances in these

cases, a judgment against Stephen Granat as administrator in his capacity as Trustee for the heirs of Mary A. O'Keefe, deceased, and consequently if the Court will find the question moot under the circumstances involved, it could only be moot as to the case where Stephen Granat was representative of the estate of Mary A. O'Keefe, deceased, and certainly not in his capacity as Trustee for the heirs because the findings clearly would be finding against Mary O'Keefe because of her negligent driving and therefore, we contend that under well established principles, if this appeal is moot as to this one case, it could be moot as to only the one case and not as to the other two.

But we do say that in accordance with the general rule mentioned in Section 1354, Subdivision 6, 5 C. J. S. page 425 that there was a terrible pressure on the liability insurance company with this extremely heavy judgment entered against their insured to make an adjustment of the case, if possible, and dispose of the liability which they would have as liability insurance representative of the estate of Mary A. O'Keefe deceased.

The joinder of the plaintiffs in the three cases before the court at this time were joined as a procedural matter and it did not effect the substantive rights of the parties.

See:

Landsburg and Brothers v. Clark, 127 Federal (2d) page 331.

The principle of law for which we contend is illustrated in the following case from the Supreme Court of North Carolina and which shows that a plaintiff in the same position as Stephen Granat as in these cases is not estopped

from proceeding in a different capacity in connection with the same automobile accident, and we think it illustrates the point which we are asking the court to consider at the present time.

Joe Ellis Raybill v. Rosa Ferris, 213 N. C. 414, 196 S E 321.

See note: 116 A. L. R. page 1087.

We invite the Court to an examination of a very good anotation on the subject which appears in 170 A. L. R. commencing at page 1180.

See also Subdivision B. in Note on page 1202 as between different fiduciary capacities.

We also call the court's attention in support of our position, in this matter to the text of Barron and Holtzoff Federal Practice and Procedure on page 105 under Rule 20, Section 532 where the following appears:

"Although plaintiffs may be joined in one action their claims remain as separate and distinct as if asserted in separate actions. The rule itself provides that judgment may be given for one or more of the plaintiffs according to their respective rights to relief. Thus where a wife, suing for damages for personal injuries, was joined with her husband suing for expense and loss of services a judgment against the wife did not preclude a verdict in favor of the husband, as the bringing of a joint action did not affect the substantive rights of the parties."

2 Federal Practice and Procedure, Section 532, page 105.

"Consolidation of two causes does not have effect of making the parties to one suit parties in the other, but the causes preserve their separate identity. The pleadings in one case cannot be made the pleadings in the other. Purpose of consolidation is to allow the

proofs in one cause to stand as proofs in the other with reference to common questions of fact."

National Nut Co. of Cal. v Susu Nut Co., D. C. Ill. 1945, 61 F. Supp. 86.

As to causes 1798-1799.

1. There is no identity of the thing sued for.
2. There is no identity of the cause of action.
3. There is no identity of the persons and parties to the action.
4. There is no identity of the quality of the person for or against whom the claim is made.

50 C. J. S. Judgments, Section 598, page 16.

We respectfully asked the Court to examine the points which we have presented and we urge that this case should be reversed.

Respectfully submitted,

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No. 16,127
United States Court of Appeals
For the Ninth Circuit

EDWARD J. BLOOM,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

APPELLANT'S PETITION FOR A REHEARING.

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FILED

DEC 31 1969

PAUL P. O'BRIEN, CLERK

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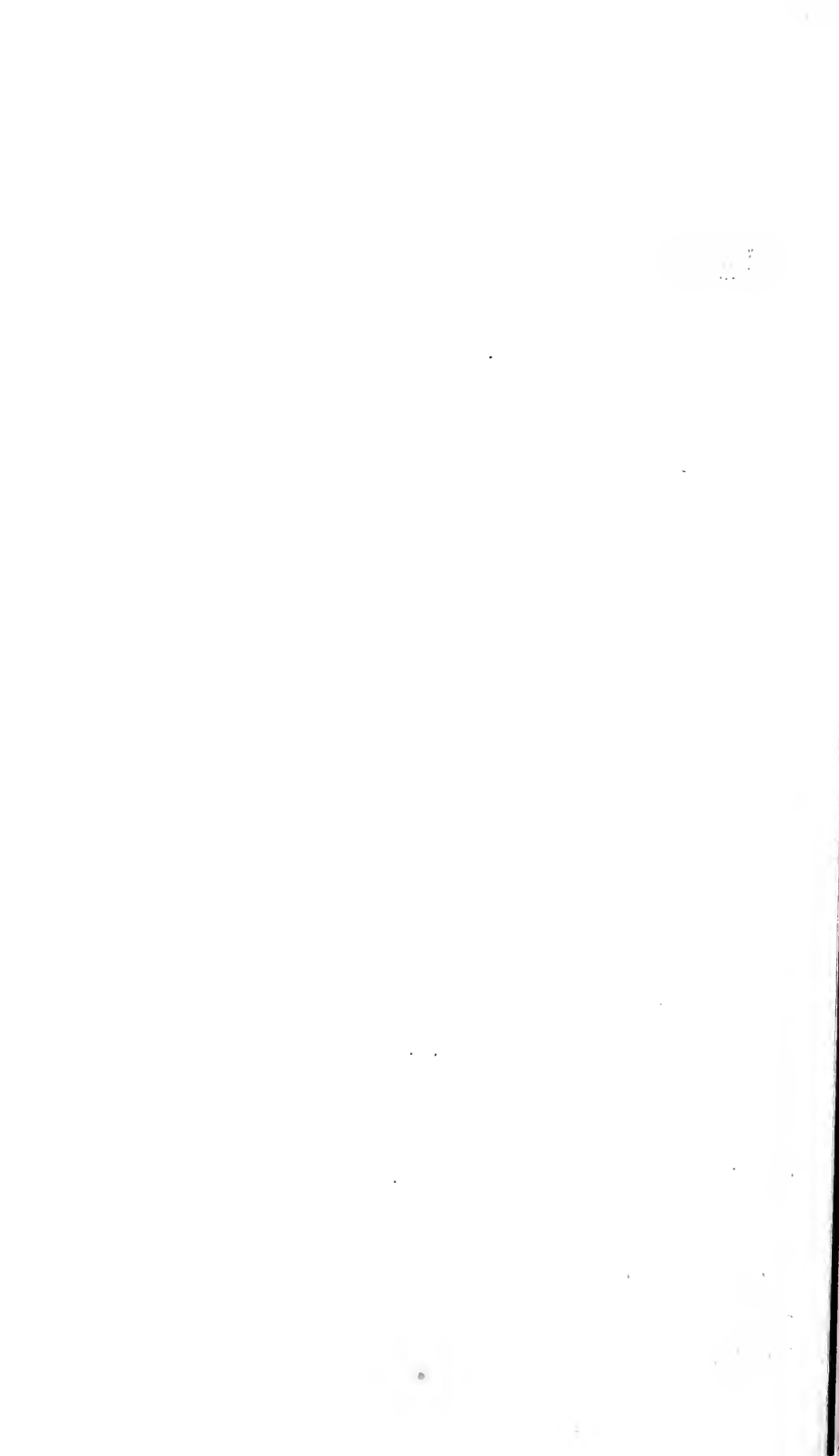
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No. 16,127

**United States Court of Appeals
For the Ninth Circuit**

EDWARD J. BLOOM,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable Richard H. Chambers, Chief Judge
and the Associate Judges of the United States
Court of Appeals for the Ninth Circuit:*

Comes now the appellant and respectfully begs this Court to grant a rehearing of the above-entitled cause, and in support thereof respectfully shows:

PRELIMINARY STATEMENT.

On page 10 of the opinion this Court relies upon this Court's recent decision in *Wilson v. U. S.*, 250 F. 2d 312. The distinction which we argue this Court has missed entirely in its opinion is just this: "Ap-

pellant was chief executive officer of the corporation. It was his responsibility to determine how *corporate* funds should be expended." But the uncontradicted testimony was that all of the money in corporate accounts was trust money, i.e., money released to appellant and Idaho Smelting, Inc. under the Uniform Trust Receipts Act. Over such funds appellant or the corporation of which he was chief executive officer had no control whatever. Further to divest the corporation of any capacity to exercise *any* judgment or election as to what bills should be paid and when, the record shows that the bank extended overdrafts to Idaho Smelting up to \$54,000 monthly and that overdrafts, (i.e. the absence of any funds in the corporate accounts) extended throughout the latter part of 1947 and all of 1948. (Exhibit K.)

It is apparent from examination of Exhibit K that no funds were actually collected and withheld by Idaho Smelting Inc., or appellant, and that the tax returns made were computations of the tax that should be paid from the same source that paid the wages. Since this source was an overdraft, no actual money was in the hands of Idaho Smelting, Inc., or appellant, and it is uncontradicted that the bank would have had to approve and pay such an overdraft, and that they failed to do so. If there was occasionally a few dollars it was covered by a trust receipt and belonged to the bank. There can be no contradiction of appellant's positive testimony that the bank refused to authorize such an overdraft by the bank officers' testimony that they had destroyed all their

records and had no personal recollection of such refusal.

Therefore the Court's opinion that there is any conflict whatever in the testimony is wholly incorrect in the light of the whole record and its exhibits, and the opinion of the trial Court is clearly erroneous as a matter of law.

By the terms of this decision, appellant is found liable for a penalty under the Internal Revenue laws for *not* doing something (paying corporate withholding taxes) when by the laws of the State of Washington he would have been *criminally* liable for a prosecution for embezzlement if he had done so from proceeds of trust receipt financing.

Such is not and cannot be the law. Surely the taxpayer-citizen must have some means of engaging in legal business activity under time-honored trust receipt methods of financing without being forced to choose between the Scylla of personal income tax penalties for corporate obligations and the Charybdis of state criminal prosecution.

The Court correctly states on page 2 of its opinion that

“The terms of the financing agreement . . . required the Corporation to buy and sell aluminum on a trust receipt basis.” (See also Exhibits A, B & C.)

The entruster's (bank's) interest in a trust receipt transaction is a property interest unaffected by Federal tax liens or attachment liens against property

of the trustee. The object of the Uniform Trust Receipt Act is to standardize and protect the trust receipt method of financing the acquisition and resale of goods in their journey from producer to retailer. See headnotes 6 and 10, *Commercial Credit v. Bosse*, 283 P. 2d 937, and text. The deposit of proceeds to the account of the corporation did not change the trust character or deprive the entruster of its rights therein. Entruster's interest in the proceeds is a property interest and not a lien. *Commercial Credit v. Bosse, supra*.

The Court's attention is also called to Judge Hamley's opinion in *Maulding v. U. S.*, 257 Fed. 2d 56 and cases cited therein, for further definitions and explanations of trust receipt transactions.

Appellant submits that this Court correctly found that Idaho Smelting, Inc., was engaged in the aluminum business on a trust receipts method of financing but failed to consider fully the legal, fiduciary, trust, and economic factors arising out of that relationship. A standard form of the trust receipt used by Idaho Smelting is incorporated in this record on appeal as Exhibit "D". The specific provisions of this document, binding upon Idaho Smelting, Inc., and the appellant as an officer and director are as follows:

Trust Receipt

The undersigned (hereinafter called the "Trustee" within the meaning of the term as defined by the Uniform Trust Receipts Act of the State of Washington) hereby acknowledges receipt from, and the holding in trust for, Seattle Trust and

Savings Bank of Seattle, (hereinafter called the "Entruster" within the meaning of the term as defined by the Uniform Trust Receipts Act of the State of Washington) of the goods, documents and/or instruments specified below, and agrees and acknowledges that a security interest in said goods, documents and/or instruments, and in any goods represented by said documents and/or instruments, remains in, or will remain in, or has passed to, or will pass to, the Entruster. Said goods, documents and/or instruments secure an indebtedness . . . owing to Seattle Trust and Savings Bank of Seattle, at its Main Branch, together with interest thereon in accordance with the terms of the credit, agreements, draft or note evidencing said loan and all indebtedness for which the goods, documents or instruments hereinbelow described, or any of them, were security before the trust receipt transaction evidenced by this instrument. . . .

. . . In consideration of such receipt and other valuable considerations, the Trustee agrees to hold said goods, documents and/or instruments in trust for the Entruster and subject to its security interest, to be used promptly by the Trustee without expense to the Entruster for the following purpose(s) checked below but for no other purpose(s) and without liberty to hypothecate, mortgage, pledge, assign or make any other disposition of the same or, unless hereinafter expressly provided, to sell the same:

1. To transfer to carrier.
2. To transfer to warehouse.
3. To deliver said goods to . . . who have/has agreed to purchase the same.

4. To sell said goods, subject to the following limitations (if any).

5. To manufacture or process said goods and to sell the same, whether or not manufactured or processed.

6. *

The Trustee agrees to account by delivering to the Entruster immediately upon receipt thereof by the Trustee, . . .

. . . The Entruster shall have full power to compromise and collect such proceeds in its own name or that of the Trustee. *The Trustee agrees that all proceeds of the sale or exchange of said goods, documents and/or instruments or any of them, if, as, and when said proceeds are received by Trustee, shall be held by the Trustee in trust for the benefit of the Entruster and the Trustee agrees to promptly account and pay to the Entruster all of said proceeds. . . .*

The Trustee agrees to pay all expenses and charges in connection with said goods, documents, instruments and any proceeds thereof, and will at all times while the same are in its hands hold said goods, documents, instruments *and proceeds* separate and distinct from any property of the Trustee and capable of identification and will definitely show such separation in all its records and entries. . . . The Entruster shall have the same security interest in any additions or improvements to goods as it had in the goods themselves. . . .

The Trustee agrees to deliver to the Entruster, on demand, accurate records and copies of all accounts with respect to said goods, documents, instruments *or proceeds thereof* and to execute

any assignments or other documents in connection therewith which the Entruster may require, and *the Trustee further agrees that there will be no offsets or credits against any claims or accounts constituting proceeds of said goods*, documents or instruments and guarantees payment of said claims and accounts in full.

. . . No waiver of any rights or powers of the Entruster or consent by it shall be valid unless in writing signed by the Entruster. No waiver of any existing default shall be deemed to waive any subsequent default, and all rights hereunder are cumulative, and not alternative, and are in addition to any rights given by law to the Entruster. In the event that the Trustee may have other trust receipt transactions with the Entruster, the default of the Trustee in the payment of any obligation to said Entruster secured by this or any other trust receipt transaction, will cause all indebtedness of the said Trustee to said Entruster, at the option of the Entruster and without notice to the Trustee, to become due and payable, irrespective of any maturity dates provided for in the obligations evidencing said indebtedness.

From the above terms, it is obvious that Idaho Smelting, Inc., and the appellant had no leeway—no discretion—as to the use or control of the funds of the bank released to it in trust and on deposit in the account of Idaho Smelting, Inc., in occasional liquidation of the overdrafts without the express consent of the bank. And, as is amply borne out by the record, throughout 1948 the bank was primarily, if not solely, interested in satisfying the corporation's

liabilities to it. (Exhibit L.) This Court implies on page 9 of its opinion that funds *were* available for the payment of these taxes and that the bank would have approved the payment of them if only so requested by the corporation. On the contrary, the entire course of the corporation's affairs from September, 1947, as revealed by the documentary evidence (Exhibits L, M, N, O and U), and the uncontradicted testimony of appellant (T. R. pp. 79 et seq.), the bank officials (Depositions of Baillargeon and Winslow) and the corporation's officers (Depositions of Salyer and Thompson) discloses that the bank was justifiably concerned about the substantial loans outstanding which had been jeopardized by the collapse of the metal market; that pressure was thereupon placed upon the corporation to liquidate its large inventory held under trust receipt at depressed prices; that they persuaded other creditors to accept debentures rather than cash; and that the appellant much later attempted to "bail out" the corporation through use of his personal funds even though he was not obligated to do so. There is no place in the record where there is any concession by any witness that funds in corporate accounts or control were not covered by trust receipts.

The entruster's (bank's) interest in a trust receipt is an absolute property right; at all times pertinent to the withholding taxes in question the bank actually had *title* to the funds of the corporation (see Exhibit "D"). The corporation itself was merely a trustee for the bank, and could take no action concerning

such funds without the bank's consent. The bank's interest in the funds was absolutely unaffected by the existence of Federal tax liens or attachment liens against the property of the trustee.

This Court in *General Motors Acceptance Corporation v. Kline*,¹ held that title to the property held under trust receipts was in the financing institution, and that the legal effect of the trust receipt is to be determined by state law.

The Supreme Court of Idaho, *Commercial Credit Corporation v. Bosse*² (in which the United States, among others, appealed from a judgment in favor of the entruster) stated on page 939:

"Appellant, United States of America, does not contend that it had a (income and withholding) tax lien on the automobile superior to the rights of respondent."

The Court then held:

"Having determined that the security interest of respondent in the funds held by appellant sheriff is a property right, it follows that respondent was entitled to maintain its action in claim and delivery to recover such proceeds. Such property right was at all times present in such proceeds and is unaffected by any of the tax liens or attachment liens of appellants against the property of Bosse Motor, Inc."³

¹78 F.2d 618 (CCA 9th, 1935).

²283 P.2d 937 (1955).

³*Id.* at p. 941.

As an officer of Idaho Smelting, Inc., the appellant was in a fiduciary position in relation to the bank. If he had taken it upon himself to disburse the *bank's funds*—and all of the income of the corporation was such during this period—then he would have been liable, both civilly and criminally for this misappropriation and embezzlement. (Under Washington statutes, R.C.W. 9.54.010, a trustee may be imprisoned for just such an act of larceny.) Appellant was not privileged by his position as president of the company to take funds *belonging to someone else* and apply them to corporate debts any more than any other trustee, guardian, or executor. Once this basic fact of trust receipt financing is acknowledged, it is obvious that the judgment appealed from is clearly incorrect on two grounds.

First, that appellant was not, and could not have been under the circumstances, the “person” whose duty it was to account for and pay over the corporation’s taxes when he had no control over the disbursements.

Secondly, the corporation’s and appellant’s legal rights and obligations under this trust receipt system of financing preclude any conceivable holding that appellant “wilfully” failed to pay such taxes within the meaning of Section 2707(a).

How may a person be penalized for “wilfully” failing to pay taxes when he not only did not *own* the funds allegedly available to pay them or have any power or authority to disburse them, except as

checked by the terms of the trust receipt, but also would have been guilty of a breach of an express fiduciary relationship and criminally liable for larceny if he had done so?

Obviously, if appellant had turned the entire corporation over to the bank at the time the withholding taxes were first unpaid, or if the corporation had elected to undergo bankruptcy, no question would arise of appellant's liability now. He is now being penalized for this error in judgment in attempting to weather out the depressed metal market of the late 1940's in the hope that after his trust obligations to the bank had been satisfied, he would be able to reactivate the enterprise and make good the corporation's debts to the government and other creditors. If appellant had used *corporate* funds for other purposes than taxes, that election so to do might subject him under current cases to penalty; but use of the bank's trust funds in the corporation account is NOT in any sense the same thing as the use of "corporate" funds. See *Commercial Credit Co. v. Bosse*, 283 P. 2d 937, 941, *supra*.

Although appellant raised timely objections during the trial and stressed the penalty nature of this proceeding by the government in his brief,⁴ this Court did not consider in its opinion the serious constitutional question of the manner in which the penalty was imposed in this case. As previously stated appellant sought to obtain a hearing in the Tax Court

⁴A.O.B. pp. 21-23.

after the assessment in question had been levied. That Court dismissed his petition, with the opinion that the matter in suit was a penalty over which the Tax Court had no jurisdiction. (Exhibit V.)

As appellant was not financially able to pay this penalty and then sue for a refund, his two District Court suits having been dismissed, he had no way of challenging or removing the liens against him until the government instituted this suit over six years later. The facts are undisputed and the government does not challenge appellant's statement that it relied upon its arbitrary *penalty* assessment made without notice or opportunity of a hearing—as establishing a *prima facie* case, thereby shifting completely the burden of proof to the appellant. Certainly there is no question but that appellant was prejudiced by the trial Court's denial of his motion to dismiss based on such grounds, in a case involving disputed issues of fact. Both the above mentioned tax Court decision (Exhibit V) and *Enochs v. Green*⁵ recognize that the amounts involved here are a *penalty*, rather than a *tax*.⁶ Respondent has cited no authority in the Code, Regulations, or case law—and appellant knows of none—which stands for the proposition that a mere *assessment* of a *penalty* is sufficient to establish a *prima facie* case for the Government. See also the minority opinion in *Enochs v. Green, supra*.

⁵270 F. 2d 558 (C.C.A. 5th, 1959).

⁶This is doubtless the reason the Government brought suit against appellant, rather than proceeding by way of distraint or jeopardy assessment.

THE COURT DID NOT CONSIDER THE CONSTITUTIONAL
QUESTIONS RAISED BY APPELLANT.

Appellant submits that this Court did not consider in its opinion the constitutional objections to Section 2707(a) as applied in this case. The basis of appellant's contention in this respect is that there is *no* constitutional authorization or power for the *ex parte* assessment of a penalty under these circumstances, and that if 2707(a) purports to grant the Director of Internal Revenue the power to make and collect such a penalty "in the same manner as *taxes* are assessed and collected" it is unconstitutional and void as an arbitrary and capricious exercise of the taxing power and deprives the appellant of property without due process of law.

Further, appellant raised due process objections to the manner of assessment and the manner in which the District Court conducted the trial in that the burden of proof of *disproving* a *penalty* was imposed upon him as the *defendant* in the civil action. The Government relied completely on their assessment as sufficing for a *prima facie* case (T. R., Vol. II, pp. 16-17). Contrary to the statement of counsel for the Government on page 17 of Volume II of the transcript, there is *no* law supporting such a proposition in respect to a penalty.

PRAYER.

For all of the reasons hereinabove set forth appellant respectfully prays that this Court set the case down for reconsideration and rehearing; and in the event the Court fails to do so appellant respectfully prays that the Court stay its mandate pending the filing by appellant of a petition for certiorari in the Supreme Court of the United States and pending disposition by that Court.

Dated, San Francisco, California,
December 30, 1959.

Respectfully submitted,

JAMES W. HARVEY,

DOROTHY E. HANDY,

*Attorneys for Appellant
and Petitioner.*

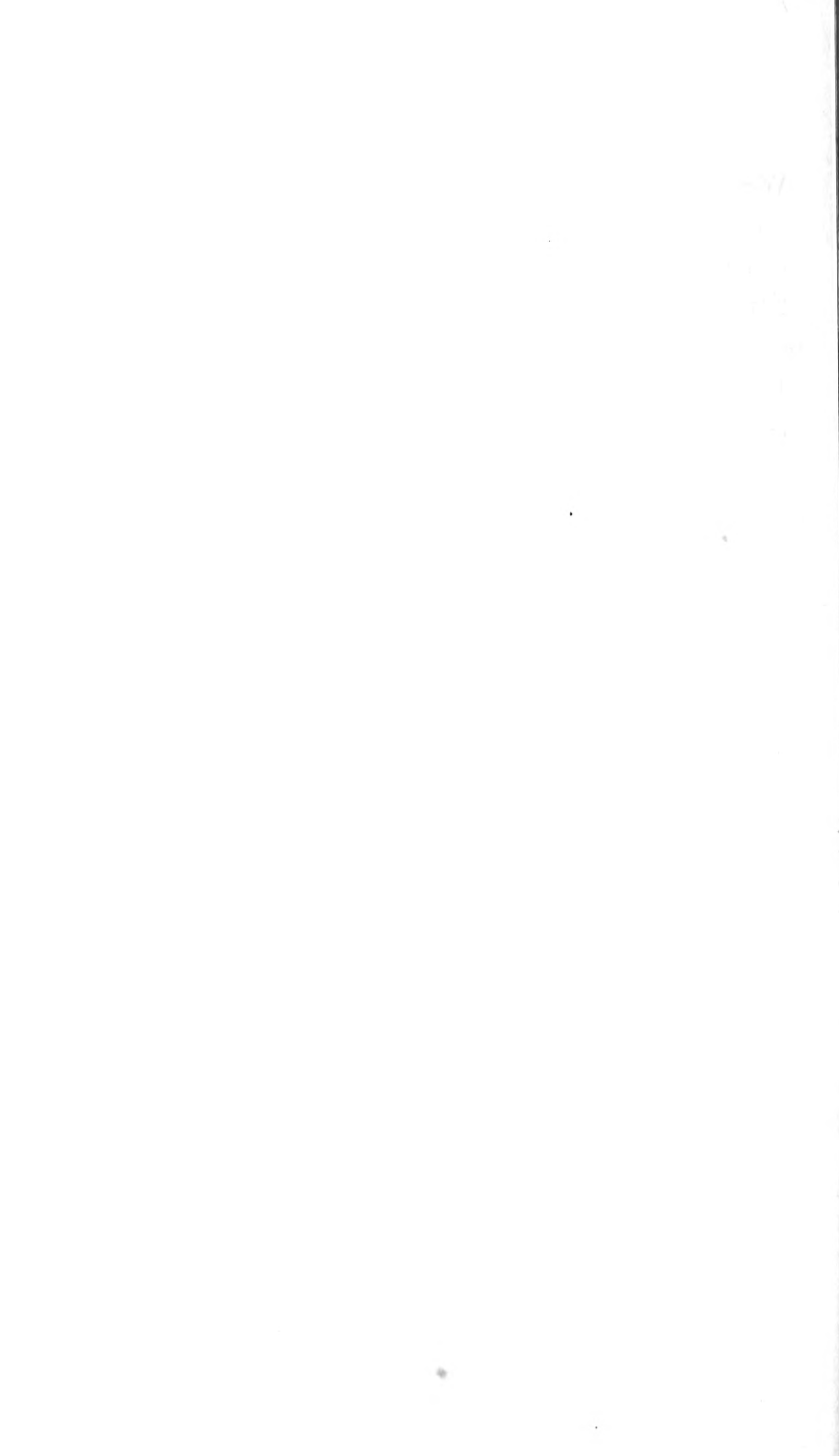
CLARK A. BARRETT,
Of Counsel.

CERTIFICATE.

We, James W. Harvey and Dorothy E. Handy, attorneys for Edward J. Bloom, the appellant herein, and Clark A. Barrett, of counsel, certify that this petition is presented in good faith; that it is not interposed for delay; and that in our judgment it is well founded.

Dated, San Francisco, California,
December 30, 1959.

JAMES W. HARVEY,
DOROTHY E. HANDY,
CLARK A. BARRETT.



United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES W. CARLSTROM, SOUTHERN
CALIFORNIA CHILDREN'S AID FOUNDA-
TION, INC., a corporation, SOUTHERN
CALIFORNIA DISTRICT COUNCIL OF THE
ASSEMBLIES OF GOD, INC., a corpora-
tion, and THE SALVATION ARMY, a
corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF

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FILED

JUL 15 1959



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No. 16128

IN THE

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CHARLES W. CARLSTROM,
SOUTHERN CALIFORNIA CHILDREN'S
AID FOUNDATION, INC. , a corporation,
SOUTHERN CALIFORNIA DISTRICT
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SALVATION ARMY, a corporation,

Appellants,

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APPELLANTS' OPENING BRIEF

This is no ordinary condemnation case. We read that the races of prehistoric mammals disappeared from the face of the earth because of their ponderous proportions. A 19-week jury trial such as this must likewise fall of its own weight. A decision of the United States Court of Appeals, for the Fifth Circuit in 1954, *Gwathmey v United States*, quoted hereafter, makes this clear, but in our case, an initial taking burgeoned into a monster which cannot survive.

Its footprint should first be noted. It is recorded in Volume VI of the Transcript of Record herein "Book of Exhibits", (thousands of tabulated figures), a print so huge that twelve men and women, good and true, became lost within it. Volume I depicts the origin and growth of the creature and Volumes II, III, IV and V trace its path through the jungle of expert testimony.

Appellants contend that aside from incidental errors, this case comprised so many extraordinary ramifications and attained such great volume as to deprive appellants of their right of due process of law at the hands of the jury and to take their property without just compensation.

The United States of America in its initial taking May 27, 1953, elected to condemn only the right of term occupation of the immense former Convair property in the City of San Diego. Its original complaint was confined to this. A second taking occurred over two years later, June 16, 1955, when full possession was taken and an amended complaint was filed for condemnation of fee titles. Judgment upon the jury's multiple verdicts was entered November 26, 1957. We thus have the spectacle of an action in eminent domain - in reality two actions consolidated over the protest of appellants - dragging through the United States Trial Court for a period of four and one-half years!

This complication was doubtless occasioned by a change of policy in Washington, D. C. and was supported by the learned trial judge in his honest belief that consolidation of all issues before a single jury was feasible and would result in a saving of the court's time and of

the taxpayers' money. Despite the outstanding diligence and capability of the trial judge it turned out to be at the expense of the property owners. Hence this appeal.

Trial before a jury commenced January 2, 1957, and was not concluded until May 27, 1957, a period of more than 4 months. The last 14 days were devoted to deliberation by the jury which finally brought in its verdicts for the defendants aggregating the sum of \$3,819,780.

The court, counsel on both sides and the jury, throughout the trial made valiant effort to encompass the hopeless task of full comprehension, but they were unsuccessful. Neither the government nor appellants were satisfied. Both moved for new trial. The mistake which the jury admittedly committed with respect to Parcel X was so obvious that it could be attributed only to confusion of the jury to the detriment of the government, so a reduction from \$30,000 to \$8,000 was required by the court. It was simply impossible for a jury of laymen to masticate, swallow and digest the imponderable mass of facts, figures and law which was crammed down their throats in this single trial.

Like confusion must have operated to the detriment of defendants. Their motion for new trial was based upon the same grounds here relied upon. It was denied. Both sides appealed, but the United States has since dismissed its cross-appeal. Of course, appellants' basic grievance is that they did not receive sufficient compensation for the interests and title which the government took from them. This we attribute primarily to the sea of figures and overlapping evidence with which the jury

was inevitably submerged when it was called upon to hear and decide at one sitting the issues under the two different takings.

Appellants do not challenge the verdicts on the ground of insufficiency of evidence to support them. The evidence in the record, if properly received, would have supported verdicts for \$2,000,000 at the bottom of the scale or \$10,000,000 at the top. Our challenge is confined to the following assignments of error which will be discussed in two sections.

Section One relates to the insistence by the government attorneys and the trial court that all issues under both takings be tried at one time before one jury with a single set of verdicts.

Section Two relates to particular instances of admission and rejection of evidence, always to the disadvantage of appellants and correspondingly to the advantage of the government. Ordinarily, some of these subjects would be within the field of discretion of the trial judge, but in view of the underlying abuse of discretion in denying separate trials, we shall later argue that the cumulation of these rulings aggravates the overall denial of due process of law.

SECTION I: The trial court committed abuse of its discretion in the following particulars:

By permitting plaintiff, over appellants' objection, to amend and supplement its original complaint and declaration of taking leasehold estates, only, by subsequent amendments and

supplements adding fee title estates thereto.

By failing to grant appellants' motion for separate and successive trials before the jury of the issues relating to leasehold valuation and the issues relating to fee valuation.

SECTION II: The trial court committed error of law in the trial before the jury in the following instances whereby proper factors supporting higher valuations of the subject property were withheld from the jury and improper factors were furnished to it, supporting lower valuations:

A. By admission of testimony of witness Hallock over appellants' objection, re cost of putting property in useable and useful condition for industrial purposes and instruction of the court that such cost might be considered as a factor in finding fair market value.

C. By sustaining objection to appellants' attorney Burrill's cross examination of witness Hallock, re suitability of the property for industrial purposes without repairs and rehabilitation.

C. By rejecting appellants' offer of proof of cost of reproduction of improvements, new, less depreciation, while admitting plaintiff's proof of cost of repairs and rehabilitation.

D. By admitting, over appellants' objection, the subject matter of Convair contracts and sub-contracts 1947 to 1953 as detailed in Exhibit J,

while rejecting appellants' offer of proof of leases to Convair of the property during the same period.

E. By admitting over appellants' objection, evidence of Carlstrom's purchase price more than 7 years before taking of the fee title of the subject property.

F. By admitting over appellants' objection, evidence of Carlstrom's declarations of value of the subject property before a Board of Equalization more than 4 years before taking of the fee.

G. By rejecting the offer of proof by appellants of the fair market rental value between July 1, 1954 and June 30, 1955 of Parcel 5. Parcel 6, Parcel 7, Parcel 9-A and Parcel 9 X.

H. By rejecting appellants' offers of instruction to the jury on the subject of paragraphs A, B, C, D, E, F and G.

PROBLEMS RESPECTING RECORD

This court may readily appreciate the problems of appellants' counsel in designating the record for use on this appeal. No great difficulty is involved in connection with the specific assignments of error (Section Two) though a determined effort has been made there to bring up only enough to show the basis of the rulings and the prejudice suffered by appellants.

With regard to the more far-reaching and all-

embracing error claimed in Section One - the pyramiding of separate takings and the consolidation of issues and valuations - the reconciling of thorough coverage and conservation of this court's time and energy presented and still presents great difficulty. Since appellants' undertaking in this phase of the case is to portray here the herculean burden imposed upon the jury and the human impossibility of fair comprehension of so many issues by the jurors, the first impulse is to hurl upon this court, the same full volume of the avalanche which the trial judge precipitated on a helpless jury - some 7465 pages of testimony and instructions, with some 500 exhibits.

Such a record would obviously be the most direct, but also the most tedious means possible, of making our point. It required a period of four months to marshall the evidence and fourteen days for deliberation by the jury. Granting the ability of this court to cover the same ground in half the time, or a tenth of the time, it would still be an imposition for us to demand such detailed study and analysis.

Our conclusion is, moreover, that it is unnecessary. We deem it to be sufficient to present a bird's-eye view of the combined proceedings. This should afford sufficient comprehension of the bulk mass, the ramification of interests, the multiplicity of legal principles, the diversity of estates and the irreconcilable range of expert valuations. It is not our purpose on this phase of the appeal to decipher what the jury should have found or should not have found. We seek only to portray the only alternative which was left open to the jury in view of the orders and instructions of the court - to make the best guess possible.

Again we take occasion to express our sincere admiration for the trial judge, Honorable James M. Carter, in his conduct of the case. His patience, tact, legal ability and indefatigable attention to detail stand forth throughout the record. Our only criticism is that he undertook to measure the capabilities of the jury by the same high standards which apply to himself.

Rather than to embody in the briefs appellants' own version of the undertaking upon which he launched the jury at the beginning of the trial, we have reproduced in the Printed Transcript of Record the opening statements of respective counsel. (TR. p. 375-446). It is our feeling that upon conclusion of these (if not before), the learned judge should have realized the enormity of the demands upon a group of laymen, and should have granted appellants' motions for separate trials and independent verdicts. (TR. p. 45-48). With all our admiration for the trial judge, it was doubtless too much to expect of him that after trial had commenced he would recede from his initial decision to wrap the whole affair up in a single hearing.

Pursuant to the policy above mentioned, we shall have to deal to some extent in generalities and bare references to the printed record. We shall not attempt to differentiate amongst the several appellants. They have common concern in the chief points at issue. Mr. Carlstrom's interests are interwoven with those of all the others, so with the court's permission, we shall refer to all appellants collectively. We shall use round figures in place of precise ones - largely in millions or hundreds of thousands of dollars.

Many pages of the transcript of record are devoted to reproduction of pleadings, instructions and exhibits which are not strictly necessary for consideration of the issues on this appeal. For example, the form and sufficiency of the Complaint in Condemnation (TR. p. 3), the First Amended Complaint (TR. p. 9), The Answers, (TR. p. 15), the Findings of Fact, Conclusions of Law and Final Judgment (TR. p. 255-300) and the like, though required under the Rules of Court, have no great significance. They reflect the usual form of condemnation proceedings. The vice is not in the content of these documents but in the multiple reflections which are engendered by the combination of takings involved, takings widely separated in points of time and in nature of the estates involved.

The following tabulation of the jury's verdict shows the ultimate destination arrived at by the jury (TR. p. 260-263):

**JURY VERDICT ON 14-MONTH TERM
AND OPTION TO RENEW:**

Parcel No.	Fair Market Value of 14-Month Term	Fair Market Value of Option to Renew
5	\$ 62,000.00	\$ 17,712.00
6	185,000.00	52,856.00
7	202,000.00	57,684.00
9-A	315,000.00	90,000.00
9-B	700.00	200.00
X	12,000.00	3,428.00

JURY VERDICT ON FEE TAKING:

Tract No.	Fair Market Value
A-100	\$ 275,000. 00
A-101	1, 146, 000. 00
A-102	2, 830, 000. 00
A-106	30, 000. 00
A-107	49, 000. 00
A-108	122, 000. 00
A-109	195, 000. 00
A-120	22, 000. 00
A-121	208, 000. 00

JURY ANSWER AS TO 14-MONTH TERM
ACQUISITION ON ENHANCEMENT
OF PARKING FACILITIES:

Parcel	Amount
5	\$ 1, 600. 00
6	8, 600. 00
7	9, 550. 00
9-A	10, 850. 00
9-B	100. 00
X	405. 00

JURY ANSWER AS TO FEE
ACQUISITION ON ENHANCEMENT
OF PARKING FACILITIES

Tract	Amount
A-100	\$ 7,500. 00
A-101	49,600. 00
A-102	111,500. 00
A-106	700. 00
A-107	1,300. 00
A-108	2,400. 00
A-109	5,400. 00
A-120	300. 00
A-121	1,700. 00

JURY ANSWER AS TO UNITIZATION
ON TERM TAKING:

"In the term and option taking, was there a reasonable probability of the unitization of all the parcels except Parcel 1, as of the date of the taking on May 1, 1953, or in the reasonably near future thereafter?

YES _____

NO X "

JURY ANSWER AS TO UNITIZATION
ON FEE TAKING:

"(1) In the fee taking, was there a reasonable

probability of the unitization of all the tracts in the fee taking except Tract A-100 at the date of taking on June 16, 1955, or in the reasonably near future thereafter?

YES X

NO

(2) In the fee taking was there a reasonable probability of the unitization of all the tracts, including Tract A-100 on the date of taking on June 16, 1955, or in the reasonably near future thereafter?

YES X

NO "

THE MEASURE OF DUE PROCESS

While engaged in the attempt at simplification and reduction to fundamentals, may we be indulged in a few reminiscences on the origin of condemnation and the tests of due process of law.

In its beginning a sovereign would take a man's house and lot or his farm, and a judge or jury of his peers, that is, his neighbors, acquainted with the land and with local values, would be called upon to fix the compensation. The procedure was simple, direct and fair. Far removed was the procedure in the present case where the members of the jury were unacquainted

with actual values and were furnished with no adequate information of comparable sales or leases; where the only figures available were supplied by hired experts, one group seeking to inflate values to the benefit of the owners and the other seeking to deflate them to the benefit of the sovereign.

Perhaps the necessity of abandoning original concepts of condemnation procedure is inevitable; perhaps the convenience of governments and court unavoidably imposes delays of many years in the condemnation process; perhaps the sovereign and the owner must submit to the measure of value furnished by the most persuasive of paid advocates. Especially then, should the court take pains to simplify and segregate issues insofar as possible in order to minimize "benefits" to one side or the other and to guarantee full comprehension and discrimination on the part of jurors.

Due process of law is not afforded merely by following the forms of pleadings and routine trial. As applied to proceedings in eminent domain we not only rely on the decision in Gwathmey v. United States, cited herein, but on the rules summarized in the text of Nichols, The Law of Eminent Domain. From Chapter 4 of Volume 1, we quote the following:

"It is universally agreed that the phrases 'due process of law' and 'law of the land' are synonymous and that both terms mean the same as 'due course of the law', 'due course of the law of the land', 'course of the common law' and the words 'conformably to the laws'. All of these constitutional limitations on the power of governments stem from

that lodestar of all Bill of Rights, the Magna Carta, wherein it was provided that 'No freeman shall .. be desseized .. unless by the lawful judgment of his peers or by the law of the land.' Nichols, Vol. 1 page 273-293

" . . We have, therefore, the rights of the sovereign and the rights of the individual in diametric opposition to each other. On the one hand we find the sovereign vested with the inherent right of Eminent Domain. On the other hand we have the individual vested with the equally inherent and fundamental right not to be deprived of his property without due process of law. The conflict has been resolved both at common law and under constitutional law in favor of the right of the individual to the extent that the exercise of the power of Eminent Domain is limited by the inhibition against depriving a person of his property without due process of law."

" . . However, it may be pointed out that since the individual holds property subject to the sovereign's right of Eminent Domain if the power is properly exercised pursuant to statutory authority and in compliance with established requisites, therefor, it constitutes due process." (Nichols, p. 298)

" . . As to Judicial Proceedings. Insofar as judicial proceedings are concerned, 'due process' means law in its regular course of administration, according to prescribed forms and in accordance with the general rules for the protection of individual rights." (Nichols, p. 301)

" . . Various definitions have from time to time been announced. "Due process of law" in each particular case means such an exertion of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." (Nichols, p. 302)

" . . Various other definitions have been from time to time announced by various courts and writers, as follows: 'A trial according to some settled course of proceeding. ' 'Judicial proceedings according to the course and usage of the common law. ' 'A trial by court of justice, according to the regular and established course of judicial proceedings. ' 'Process due according to the law of the land. ' 'Some legal procedure in which the person proceeded against, if he is to be concluded thereby, shall have an opportunity to defend himself. ' " (Nichols, p. 303)

We shall first endeavor to demonstrate that the consolidation of issues and estates directed by the trial court, (at the insistence of the United States and over the protest of appellants) did not conform with prescribed forms or the settled course of proceedings, or usage of the common law, or the regular and established course of actions in Eminent Domain.

SECTION ONE

The Trial Court Committed Abuse of Its Discretion by Consolidating the Second Condemnation With the First Condemnation and Requiring a Single Trial Before a Single Jury

The first taking by the government involved a right of occupancy, the length of which depended on "options" exercisable by the government. This presented to the jury the value, as of May 27, 1953, of the use taken from the occupants for an indefinite period and the loss of rentals being received by the owners.

The second taking (of fee title) put a stop to "occupancy" and presented to the jury the value (two years later) of the fee title and the loss of the then remaining right of occupancy to any tenants in possession.

Long before commencement of the trial, namely August 23, 1956, defendants sought to clarify and simplify the issues and presented their motions for separate trials and separate submissions of issues. These appear in the printed Transcript of Record, p. 45-48. However, a more graphic and entertaining presentation is found in the stenographic reporter's record of pre-trial conference on the above date. (TR. p. 305-363).

This discussion was informal and frank, appellants protesting against a joint trial involving the taking of both the leasehold and the fee, and the government insisting upon it. Mr. McPherson, the able and experienced chief counsel of the plaintiff, in reply to Mr. Seltzer of

defendants' counsel, declared:

"I agree with Mr. Seltzer's very candid statement that the verdict will be less in gross if the two terms are tried together than if they were tried with separate juries and separate verdicts taken on separate evidence in the entirety. There isn't any question about it. Anybody who contended to the contrary would not speak the truth to you, but why shouldn't the government have that benefit? Why should they expect you to give them something more than the fair market value, fixed by the Supreme Court of this country says it ought to be fixed?" (RT. p. 149, lines 5-13) TR. p. 353).

From the context (TR. p. 355-363), it is apparent that the learned United States Attorney was not in a mood to weigh too carefully the significance of this "agreement" with Mr. Sletzer. We venture to add our own concurrence to that of Mr. Seltzer and Mr. McPherson by asserting that it was of benefit to the government to lump all issues together and that thereby the gross award of the jury was materially reduced.

By this reference we mean no disrespect either to the government attorneys or to the trial judge. They were confronted with tactics passed down from Washington to them, and their sole purpose, beyond doubt, was to expedite the legal proceedings. Nonetheless, a disadvantage to appellants did arise when the government was permitted to combine a fee condemnation with a pending leasehold condemnation. This gives rise to our inquiry: By what principle of justice and by what maneuvering of pleadings is the government entitled

to deprive a property owner of a legitimate benefit before the trial begins? The Findings of Fact, prepared by the trial attorneys of the government contain, in addition to the names of the various active parties and their respective attorneys, a brief and accurate narrative of the preliminary maneuvering by the government. (TR. p. 256-259).

Had the original complaint been founded on the taking of the fee, the case would have been comparatively simple, although involving a great number of parcels and complicated factors of valuation. But in the end the jury merely would have found the fair market value of the fee title which would include all subsidiary interests and require no apportionment by the jury between occupation rights and ownership rights. It would have been the prerogative of the trial court to make division of the overall awards amongst owners and occupants. (Some of the property was under lease to other defendants). But where the government first chose to take only the right of temporary occupancy, enjoy it for a period of two years and then, by amendment and supplement in the same action, to throw all title and all interests into the hopper and compel one jury in one continuous session to grind out an impossible mass of detail not requisite to valuation of the fee - that was outside the bounds of due process of law.

The result was to deluge the court and the jury with distracting and confusing questions not directly pertinent to the fee titles and the fee valuations. Every day of the more than 100 days of trial period and every hour of the more than 100 hours of jury deliberation which were diverted to any other subject were most prejudicial to appellants.

Not only was the field of evidence opened wide, beyond all precedent, but it became so cluttered with exclusions and withdrawals that no juror could have known during deliberation whether or not the premises of his thinking were within approved precincts or entirely out of bounds.

We cite the following instances where evidence was received, passed into the consciousness (or semi-consciousness) of the respective jurymen and then was supposedly erased as in a clearing runback of a wire or tape recorder:

"The jury will be instructed to disregard the reference made to the amount of the consideration originally passing between two of these parties." (TR. p. 1670)

"The court has ruled that all those leases entered into after January 1, 1951, with the exception of one lease, which I will tell you about, are not to be considered as comparables and any testimony you have heard about them you are to forget about and we will run lines through them on Exhibit 25." (TR. p. 1754)

"You will ignore any references to Parcels 110 to 118, inclusive. They are withdrawn from your consideration." (TR. p. 1805)

"Now, what I am attempting to do is to tell you to strike from your consideration any testimony given by any of the witnesses, the defendants' witnesses, on the monetary value of these leases executed

"after January 1, 1951, except the lease No. 22, negotiated before that date." (TR. p. 1883-1884)

"The court, therefore, instructs you to disregard any reference to that percentage figure and to disregard the testimony of the witness in connection therewith as to that figure and to forget that you heard it and not to indulge in any speculation or any mathematical computations to try to find out what this reproduction cost new figure might be which the court has held that you should not consider." (TR. p. 1919)

"While I was talking to you yesterday and instructing you to disregard a certain percentage figure, I said too much; in one paragraph, on page 5268, I said, 'The court therefore instructs you to disregard any reference to that percentage figure' - that part is all right, and then I said, 'or any other percentage figure in connection with this case' is stricken out. You will disregard that, for the reason that there are various percentage figures in other parts of this testimony. I was directing my attention to a particular percentage figure." (TR. p. 1935)

"The jury will disregard the statements of counsel on both sides and will disregard my remarks in connection with ruling on this matter and forget that this ever happened. You have heard the testimony. You have seen the plant. You know almost as much about it as these men who sit here at the counsel table. Disregard the remarks of counsel on both sides and the court's remarks from your consideration." (TR. p. 2034)

"Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded." (TR. p. 2055)

"And before I forget it, when I enumerated the evidence in this case there was one other matter which is a matter of evidence, and that is the view you had of the premises. As carefully as we went over the instructions, we didn't include that, and that is part of the evidence in this case. But you will recall that it is limited to the physical buildings and not the activities contained therein; and you were told, also, to disregard the condition of the buildings on the ground that you would have to rely upon the evidence in this case, apart from your view, as to the condition of the buildings on May 1, 1953. So your view of the premises is also evidence in this case. (TR. p. 2057)

"You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the Court; such matter is to be treated as though you had never known of it." (TR. p. 2058)

"If you find and believe from the evidence that any of the witnesses have based their opinions as to fair market value upon assumed or potential uses which, while within the realm of possibility, are not fairly shown to be reasonably probable, you should disregard and exclude their testimony from your consideration to the extent you find and believe such witnesses were influenced thereby." (TR. p. 2079)

"The various prices at which portions of the subject property were leased have been admitted into evidence. The rental figures in the Convair leases after January 1, 1951, except Lease 22 on Exhibit 25-S, have been excluded and removed from your consideration." (TR. p. 2089-2090)

We do not cite these examples of impossible requirements imposed on the jurors as constituting error in admission of evidence in the first instance or in rejecting it in the second instance. They do suffice to illustrate the added confusion occasioned by the ambition of the government attorneys and the trial judge to encompass the subject matter of two or three trials in one before a single jury.

The jury members not only went into the jury room with the admonition that they remember all facts and figures submitted to them through the 119 day period of the trial, but they were further admonished to forget facts and figures designated by the court from time to time, which had already become a part of the consciousness. Not only did they have to remember what to remember, but they had to remember just what to forget!

It will be noted also that a subject termed "unitization" was submitted to the jury by way of special interrogatories. The difficulty and confusion inherent in this theoretical factor in valuation is well illustrated by the effort of the trial judge and various counsel to explain this to the jury during the testimony of witness Van Dyke (TR. p. 1016-1026) This interchange between the learned judge and counsel reflects the difficulties of memory and definition which must have been engendered

in the minds of untrained jurors throughout the whole trial. The court endeavored to instruct the jury on the subject at considerable length. (TR. p. 2098-2104; 2125-2128)

DIRECT AUTHORITY SUPPORTS
APPELLANTS' CONTENTION OF
WANT OF DUE PROCESS

GWATHMEY vs. UNITED STATES

We are not calling upon this court to pioneer in application of the Constitutional requirements for an action in eminent domain under circumstances such as those we have under consideration here.

The United States Court of Appeals, Fifth Circuit, on August 25, 1954 reversed a judgment based on a jury verdict and remanded an action brought by the United States of America affecting lands in the Cape Canaveral region: Gwathmey v. United States, 215 Fed. 2nd 148. Apparently no application was made by the government for review by the Supreme Court of the United States. Neither do we find any subsequent departure from or even judicial criticism of this ruling of the Fifth Circuit Court. It should, therefore only be required of appellants here to show on this appeal that the subject matter and procedure of the Gwathmey case were no more unusual and complicated than in our own case.

Actually the Gwathmey case was simple compared to ours, for the Carlstrom jury had infinitely more

opportunity for confusion and mistake. The Gwathmey taking was likewise in two parts, complaint being filed on one group of parcels April 15, 1950 and another complaint being filed on an adjoining group of parcels June 2, 1950 (less than two months later). The trial court consolidated the two actions for jury trial over protest of the defendant owners and on appeal this was held to constitute reversible error.

The area condemned comprised 12,000 acres, apparently of uniform nature except for some piers and docks along 50,000 feet of ocean front. The jury awarded \$369,132 simple compensation for the 50 separate tracts owned by the group appellants. Note the multiplication of difficulties in our own case:

	Gwathmey	Carlstrom
Interval between takings	25 days	749 days
Pre-trial proceedings	2 days	16 days
Jury trial proceedings	7 weeks	17 weeks
Jury deliberation	3 days	15 days
Forms of verdict & interrogatories	1	7
Verdicts appealed	\$369,132	\$3,819,780

In our case one alternate juror was dismissed because of illness during the trial. After submission another juror became incapacitated and was excused; by stipulation deliberation continued with eleven. Appellants' chief counsel dropped dead after several weeks of trial. These are tragic illustrations of the physical wear and tear on all participants.

As stated in the Gwathmey opinion, the question

before the court was precisely the one which we present here: (all emphasis is our own)

"But the principle issue and the main problem we deem it necessary to discuss, was raised by all appellants: Did the trial judge exercise a proper discretion first, in consolidating the two suits, and second, in refusing appellants' requests for separate trials and allowing the case to be presented before one jury which retired for deliberation only after all evidence of value had been entered on all property condemned." Gwathmey v U. S. 215 Fed 2nd 148 (p. 151)

The answer of the court is in this language:

"... It is not necessary to emphasize the reasons behind the Constitutional provisions for trial by jury or the requirement that the Government must pay 'just compensation' to owners when their property is taken for public use. Jury trials were instituted long before the courts were confronted with modern conditions affecting the value of property. However, the reasons for having a jury now in such proceedings are the same, i. e., obtaining the composite judgment of twelve men on the relevant facts. To insure impartial judgment the trial should be conducted in a manner that will enable the jury to understand and comprehend those facts, not alone as to the overall value of a large body of land, such as was involved here, but as to the approximate worth fairly determined of each owner's tract or tracts, including all elements which reasonably contribute to its current market

value (p. 152) To expect an untrained layman in the first place to know the important points, and in the second, to be able to record them comprehensively, and to keep them intact while handling them each day, (at the end of which they were turned over to the Clerk) requires a good deal of faith in the diligence of an average individual serving as a juror. It is not out of place for us to suggest that had these cases been tried by the judge without a jury in the same manner as was done here, he most likely would have required the court reporter to transcribe at least the most important parts of his notes, especially as to closely contested and widely varying testimony of witnesses of equal credibility and knowledge, and that considerably more time than the three days used by the jury would have elapsed before a final decision.

Government appraisal witnesses broke the whole area down into 'value zones', a procedure which they said was necessitated by the magnitude of their task. Aside from the obvious result of arbitrary assignment of tracts to particular zones, this device added greatly to the confusion and to the mass of evidence with which the jury was burdened. Each such witness explained in detail how he arrived at the zones used, the factors which resulted in the values he placed on each zone and the effect of the zoning on the value of individual tracts therein. Without exhaustive quotation we cannot illustrate the problem created by the use of such zones. It should suffice to say that when the cumbersome procedure of trial was further complicated by testimony so organized, the jury was simply swamped

by an incredible volume of figures and general data.
(p. 154)

"..... The record shows plainly, we think, that the very size of the case as tried, without the additional complexities, was such that the jury must have been overwhelmed.

In fact, during the trial there were so many tracts and so much evidence that the witnesses, the attorneys and even the judge himself seemed to be confused at times. (p. 155)

"..... They, of course did not have the transcribed record and had to rely entirely upon their recollection of the testimony of values as to those tracts that were left, with such aid as their notes might afford. When furnished with the forms of verdict containing the names of owners and numbers of tracts remaining it is most probable that there were differences in both the notes and recollections of individual jurors. . . . The task was so overwhelming they must have used whatever method of computation or approximation of values seemed reasonable to all twelve." (p. 156)

"..... Of course, value was purely a jury function when based upon an informed opinion, but because of the manner in which these consolidated cases were tried, we do not believe it was humanly possible for the jury to have a really informed opinion; and it was driven to some other device in selecting the figure. Each owner was entitled to present for the consideration of the jury all of the relevant facts and circumstances which reasonably

tended to support his valuation in a manner that they could comprehend, without being confused with others having conditions and elements distinctly different. Even if such a fair hearing should produce little difference in the ultimate outcome, it would at least afford due process, which we do not believe was possible in the circumstances under which these consolidated cases were tried. The figures have the appearance of being largely guesses; and even if it be true, as is often said, that any valuation is at best an opinion or guess, still when the pertinent facts and figures are presented in a manner that the ordinary layman can understand, his guess is at least an informed one. (p. 156)

". . . As we have said, the desirability of minimizing the length and expense of the proceedings is self-evident; and due consideration of those factors is not only permissible but essential. Even so, the primary consideration is the individual landowner's Constitutional right to due process and just compensation. Any procedure calculated to save time and expense must at the same time substantially guarantee that the landowner has a fair opportunity to have his compensation determined from the evidence in reasonable proceedings. As between a method of procedure which seriously restricts or prevents the landowner from establishing his claim in order to save time and costs and one which preserves those fundamental rights, the choice is obvious and all reasonable doubt should be resolved in favor of justice. (p. 156)

". . . . Whether or not there has been an abuse of

discretion, whether or not there has been a denial of due process, are questions which turn on the circumstances of each case. In the Coast Line case, this court found 'no such confusion or prejudice to have resulted as would show an abuse of discretion'. Here, we are of the opinion that the trial court was so impressed with the desire to save time and expense that its failure to require a reasonable breakdown of the trial prevents the landowners from obtaining a fair determination of values by the jury and was therefore an abuse of discretion." (p. 157)

"..... The practice in some districts where the Government seeks to condemn in a single suit a large body of land belonging to many owners, is to list separately each owner and his lands and to try the claims one at a time after which the jury retires and returns a verdict while the evidence is fresh in their minds, without being mixed up with other claims. Then other owners and their lands are handled in a similar fashion before the same jury, or another if desired and approved by the court. However, if the same jury is used, it has the benefit of the evidence in the preceding case or cases as well as the values which were previously used, where they are pertinent; and frequently counsel agrees that such evidence need not be repeated, thereby saving time. Conceding that more time is required, it cannot be argued that because the Government, or any other body exercising the powers of eminent domain, sees fit to include in one suit the whole area desired, involving hundreds of property owners, the court is justified in denying

the same full and fair treatment which would be given a single owner. When the element of time is considered, it is well to remember that a proceeding of this kind is not initiated by the defendant landowners but by the Government or other Agency having the power to condemn which usually wishes to get the property as cheaply as possible; whereas the owners naturally insist upon receiving what they claim is fair value. The court has the right to use all reasonable means to expedite such a trial, so long as it does not seriously curtail or deny fair treatment. Here, if the court had acceded to the request that the cases be broken down into not less than four trials of separately grouped properties of similar type and conditions, with verdicts following each trial, at least some of the confusion would have been avoided." (p. 157)

CONFUSION AND UNCERTAINTY WAS INEVITABLE

It happens that in our own case we are not required to indulge in surmise concerning the actual confusion in the minds of the jurors. This is conclusively demonstrated to the tune of \$22,000 in a single parcel. The amount of the verdict which they rendered as the fee value of tract A-106 was \$30,000. Since the most favorable testimony of value on this parcel was only \$8,000, the Government presented its motion for new trial as to that item. The jury more than trebled the highest value given by anyone to the tract. In common honesty the motion could not be opposed, so the court invited remittance of \$22,000 by the judgment creditor

and granted the motion as an alternative to consent to such reduction. This has since been made.

It does not so obviously appear that the valuations given on other tracts and other interests were not in accordance with the evidence. However, the fallibility of the jury has been definitely established in this instance. It casts grave doubt on the capability of the members to grasp, to remember or forget, and intelligently to resolve the hundreds of complicated and subtle factors which entered into the other items of the verdict. It is, accordingly, just as likely that such confusion and mistakes lie hidden in the other lump sum verdicts. Some may have been in favor of appellants, some in favor of respondent, but whoever won or lost, overall, the result was a miscarriage of justice through failure of due process in the submission to the jury of too many trials, on too many interests, under too many contingencies, involving too many people.

We do not here undertake to picture in our own words the multitude of complications in our own case, requiring segregation of options, of rights of way, of extensions of lease periods, of railroad facilities, of cost of rehabilitation of improvements, of possibility of integration, etc. In lieu of that, we have brought up in the printed record the ramifications of the case as seen through the eyes of respective counsel at the outset of the Carlstrom trial. These appear in the opening statements of respective counsel from page 375 to page 446 of the Transcript on the subject of leasehold taking and from page 1686 to page 1692 on the subject of fee taking. Coming from able counsel as they did, these furnish much less tedious reading than does the actual

testimony of the witnesses which covered the same ground subsequently at interminable length.

The picture of the trial, as thus forecast, well justified the renewal of the previous objections of defendants to the trial of all issues and a single set of verdicts from a single jury. Although the Gwathmey case was cited to the court, the suggestions for separation and simplification were again overruled.

Volume VI of the Transcript of Record reproduces forty seven pages of tabulated values submitted to the jury. To this we add in our appendix (p. i) tables of valuations which are undoubtedly more accurate and complete than any notes made by individual jurors. They summarize the figures given in oral testimony to the jury by respective expert witnesses throughout seventeen weeks of trial. As examples of the tedious and baffling form of the oral questions and answers on the same subject the Transcript quotes from the examination of 14 witnesses. (The Clerk's Index Volume I page ix-xii) gives the respective names and Transcript page references.

The scope and magnitude of the subject matter imposed upon the jury cannot be fully realized except upon reading of the 6842 pages of Reporter's Transcript and analysis of the hundreds of documentary exhibits.

Unfortunately such a search would fail to disclose any real comparable leases or sales which either the witnesses or the jury members could adopt as standards of value as a nucleus for their thinking. Because of the enormity of each of the two takings by the Government

there had been no such local leasing or purchasing, and, we venture to assert, nowhere has there ever been such a double-barrelled combination of transactions. Appellants respectfully submit that in the present case there was such marked departure from the basic concepts of condemnation and abandonment of the customary standards of fair play as to require a reversal of the judgment below.

The Carlstrom jury was not even supplied with absolute dates for valuation but were called upon to relate backward certain values and to project others forward into the future.

They were required to speculate as to feasibility of "unitization" and to give valuations according to such possibility or impossibility.

They were required to forget or remember according to the dictate of the court.

Day after day their minds were swamped with the theorizing and advocacy of paid experts, who in the end, came up with overall valuations millions of dollars apart.

The jury was permitted only a "limited" view of the premises. (TR. p. 169) Because portions of them were in use in performance of Government contracts, they were taken on a two hour bus tour. (TR. p. 181)

SECTION TWO

- A -

The Court Erred by Admission of Testimony
of Witness Hallock, Over Appellants' Objec-
tion, re Cost of Putting Property in Useable
and Useful Condition for Industrial Purposes

The first witness called by the government was John E. Hallock, a civil engineer from the Los Angeles region. (TR. p. 672). It appeared that his firm had been employed by the Army Engineers in November 1953 to make a condition report in connection with the Convair property in San Diego. He and his crew spent several weeks on the job and came up with a voluminous report as to what, at that time, would be required to bring each of the buildings up to a normal standard for carrying on the operations of industrial or commercial work therein. (TR. p. 677) He brought with him to the witness stand an extensive portfolio of photographs taken in 1953, most of which were later admitted in evidence and received designation as plaintiffs' D series.

Defendants' counsel objected to the introduction as follows:

"Mr. Burrill: If your Honor please, then we wish to object to the introduction of each and all of the photographs that plaintiff proposes to introduce in this portion of the case upon the ground that the photographs, although they may be true, correct and full representation of the particular area that is involved in the photograph, are not a true,

correct and full representation of the entire property that is involved, and that the photographs of the so-called areas that are covered generally as to specific locations are of such a size that a comparable photograph of an entire area of which these photographs are a part cannot be adequately produced by the defendants; first, because we did not have an opportunity because of security regulations to take any photographs in the property either immediately following the takeover by the government or preceding that period, if we had known the exact day.

We particularly wish to object to the introduction of these photographs unless the jury is given an opportunity to view the premises so that they may gain an accurate impression of the general overall condition of the property as compared to these specific photographs.

Mr. Janofsky: Same objection, your Honor.

Mr. Horton: Same objection, your Honor. "

(TR. p. 682-683)

The objections were overruled by the court, and the witness proceeded to testify, amongst other things, concerning the "specific defects" (TR. p. 689) which had been selected for photographing. (Later testimony showed that there had been no change in condition since the date of first taking, May 1, 1953).

Mr. Hallock spent several days on the witness

stand. Much of this time was spent in describing the 88 photographs of the D Series. These were admittedly taken to show deterioration or damage of hundreds of spots throughout the various buildings. Admittedly they did not portray the overall conditions. It was as if the jury were permitted to examine the various buildings through a telescope but the government took pains to direct and focus the instrument only on portions selected for their appearance of collapse or ruin!

Still more objectionable was the cost of repairs which the witness was permitted to assess against the respective portions. Hallock was not called as an expert appraiser to give his opinion as to market values. Apparently he was called as an expert archeologist to describe an ancient ruin and estimate the cost of restoration! He gave no figure as to the ultimate value with or without repairs. We cannot conceive that a mere muck-raker has a legitimate place on the witness stand in an action of eminent domain.

In the case of Kintner v. United States, 156 Fed. 2nd 5 it was held that evidence of the cost of repairs must be rejected as clearly irrelevant. The Court of Appeals held that admission of dollar costs constituted reversible error.

The Court Erred in Restricting Cross-
Examination of Witness Hallock

Upon conclusion of his cross-examination of the Government's witness Hallock on various details of his direct testimony, Mr. Burrill of appellants' counsel undertook to cross-examine him regarding his testimony as to necessity of repairs and rehabilitation and the necessary expenditures therefor.

Mr. Burrill sought to test the credibility of Hallock's opinion that the aggregate cost of bringing the properties shown on plaintiffs' exhibit A to a condition where they would be useable and useful for industrial purposes would be \$1,478,600. To do this he proposed to elicit from the witness admissions that the property was in fact useful for such purposes and had actually been used therefor for a number of years subsequently without material rehabilitation.

Government counsel objected and his objections were sustained by the court. The colloquy between counsel and the court took place in the presence of the jury and is reproduced on pages 996 to 998 of the Transcript of Record herein. It goes like this:

"MR. BURRILL: The purpose of the question, if your Honor please, is to test the credibility of the witness's opinion that these properties are not a useful facility for industrial purposes during the period of time that I inquired about.

"THE COURT: The objection is sustained. We are looking at the situation as of May 1, 1953. I permitted testimony to December 1953 with the foundation carrying it back to May. To open up a question of what had been done thereafter would be to multiply this case endlessly. We would then have problems as to how much of the work, if all, was done, why it was done; what judgment was used and what was done or what was not done. And none of it would be of assistance in judging the opinion of this witness.

"MR. BURRILL: Well, if your Honor please - -

"THE COURT: The mere fact that he might reach a different conclusion than some other man might reach doesn't add anything.

"MR. BURRILL: It seems to me, if the court please, that the witness's testimony in reference to a useful facility, his opinion is tested if the property has operated for almost four years without those things being done.

"THE COURT: Well, then we would have to take another week's testimony to see what the condition was of the Convair plant and spend a week having witnesses tell us now what is the condition and what has been done. We are not going to do that. We are going to determine what the condition of this plant was on May 1, 1953. If the whole plant fell in the ocean after that date it wouldn't make any difference in this case.

"MR. BURRILL: I agree, if that happened it would make no difference. But it seems to me it makes quite a substantial difference, particularly in our rental value, the question whether or not this property is a useful property for industrial purposes, whether or not these things have been done during that period of time. Now, it might be desirable to do certain things. It might be desirable or important in the fee question of the case. But as I understand it, this testimony is relating to both the rental period and is relating also to the fee period. And I assume that the witnesses for the Government are going to predicate some of their opinions upon the opinion of this witness. And it seems to me that I am entitled to test the credibility of this witness's opinion that certain things must be done to make it a useful property for industrial purposes, to find out whether or not it's operated for four or five years without it.

"THE COURT: The witness has stated to you in reply to your questions, Mr. Burrill, that this question of usefulness is a matter of degree. And he has given several examples which seem intelligent to me. And I think they were probably understandable to the jury.

"MR. BURRILL: I have to submit it for a ruling, then, your Honor.

"THE COURT: I have already ruled.

"MR. BURRILL: I didn't realize you had ruled on the question.

"THE COURT: The objection was sustained. "

We have heretofore discussed the impropriety of forcing the attention of the jury on the scene of ruin and desuetude painted by the witness Hallock. Whether or not the court committed error in this connection we respectfully submit that it did commit error in denying to appellants the opportunity to show out of the mouth of this same witness while he was still on the stand that despite the defects which he had pointed out and the alleged requirement of expenditure according to his figures exceeding a million and a half dollars to put the premises in a condition "useable and useful for industrial purposes", they continued to be employed for just such purposes for a long time immediately following without expenditures of a million and a half dollars or any substantial fraction thereof.

We sympathize with the court's expressed determination to avoid "another week's testimony" on the subject. This government witness had already been on the stand several days. We submit, however, that the trial judge's anticipation of undue delay was premature. Mr. Burrill was entitled to an answer from Mr. Hallock. It could have been: "There was no such subsequent use of the premises," or, "No such use was made until a substantial part of the million and a half had been expended in making the requisite repairs and replacements. " The court's prediction that it would take a week's testimony to ascertain what had been done and why, must have been taken by the jury as indicating his belief that the second alternative answer above was the one to be expected and that such was indeed the fact.

This was highly prejudicial. The owners were confronted with an unusual line of testimony in the direct examination of Mr. Hallock, not the opinions of an expert as to fair market values, but the opinion of an expert as to specific defects in the property. His whole thesis was that the defects were so prevalent and extensive as to leave the property unfit for customary industrial uses and that it could be made fit only by outlay of more than a million and a half dollars in repairs and replacements.

Admittedly the greatest value of the property lay in its suitability and availability for industrial uses. The crucial consideration for the jury became, "was it reasonably available and fitted for such use at the first date of taking?" What better and more instantaneous refutation of Mr. Hallock's opinion could be offered than an admission by that same witness that important and satisfactory useage ensued very shortly and continued for a long period contrary to the judgment and prediction of the witness?

Had the witness been required to answer one way or the other there still would have remained to the court the opportunity to sustain an objection at a later stage restricting Mr. Burrill's cross examination had it gone too far afield.

As the matter was handled it seems reasonable to surmise that the jury after examining Mr. Hallock's discount tag confirmed by their own observation of the general authenticity of the photographic selections made by Mr. Hallock, applied Mr. Hallock's discount to whatever other yardstick of valuation measurement they had

agreed upon and that their ultimate aggregate verdict was deficient at least in the sum of one and one-half million dollars.

- C -

The Court Erred in Rejecting Appellants'
Offer of Proof of Cost of Reproduction of
Improvements Less Depreciation

After the court had informally indicated to counsel that he would not permit introduction of testimony on the subject of cost of reproduction less depreciation, a conference ensued in which Mr. Burrill, counsel for appellants, offered to prove that Mr. Burlake would testify that the cost of reproduction new of the facilities as of May 1, 1953 would be \$15,069,140 and that after subtraction of straight line depreciation, including functional depreciation and deferred maintenance, the market value would amount to \$9,217,397. (TR. p. 1035-1037); that Mr. Burlake's testimony would cover only the facilities that were there on the property as of May 1, 1953 and would not include any properties which were not there. It would include production equipment. The offer of proof was limited to those properties owned by the appellants Carlstrom, Salvation Army, a California corporation and Assemblies of God as of May 1, 1953. To this offer Mr. MacPherson, counsel for respondent, objected on the ground that as a matter of law reproduction new less depreciation of a partial facility would never be admissible in evidence as proof of value either of rental or as of the fee. (TR. p. 1038) He waived objection as to the form of the offer. (TR. p. 1039)

Appellants contend that the offer was proper and that such testimony should have been received in view of the fact that no satisfactory comparable transactions either of leasing or sale were available and other means and elements of fixing value were also given to the jury. Such practice has been well recognized by several U. S. Courts of Appeal. Such rulings were in pursuance of a decision by the Supreme Court of the United States in an action for damages arising out of ships' collision. The court held that cost of reproduction as of date of valuation constitutes proper evidence to be considered in ascertainment of value as a measure of damage for destruction of property. It added that neither cost of reproduction new nor that less depreciation is measure or sole guide of market value. (Standard Oil Co. of New Jersey v. Southern Pacific Co., 268 U. S. 465, 45 U. S. 146)

Subsequently the Supreme Court in a condemnation suit brought by the Government held that separate trials on parcels or for individuals are not required and it approved an instruction to the jury to consider what the property did cost and what it would now cost. (Kohl v. U. S., 91 U. S. 267, 23 L Ed 449).

Subsequently the Seventh Circuit Court held that what a plant originally cost, what the owner paid for it at judicial sale, it not having been a sheriff's sale, and what it should cost to reproduce the plant less a fair depreciation, may all be considered but neither is to be taken as a fixed standard. This was a condemnation proceeding brought by the United States in connection with the Tennessee Valley Authority. (U. S. v. 2.4 acres, 132 Fed. 2nd 295)

In another condemnation case from the Fourth Circuit Court where a country estate was being condemned by the government, the court held that it was largely discretionary with the court to admit evidence as to reproduction cost. Such evidence was properly admitted and there was no error where the court gave instructions fully as to other factors of valuations. (U. S. v. Wyes, 131 Fed. 2nd 851)

In a condemnation of shipyards by the United States it was held in the Fifth Circuit Court that the cost of construction of shipyards was properly received if accompanied by evidence to show that such costs were reasonable. It was also proper to receive evidence as to cost of reproduction. (U. S. v. Savannah Shipyards 139 Fed. 2nd. 395).

- D -

The Court Erred in Rejecting Convair
Leases, While Admitting Convair
Manufacturing Contracts

Carlstrom purchased the property which had been declared surplus by the government in 1947 and took title in 1948. He leased out a few portions of it and sold a small part, but there had been no real activity in leasing or selling except for about 30 leases made to Convair. Most of these were executed about the year 1951 and some of the terms ran until after 1953.

After several weeks of the trial, defendants' counsel

offered these leases as proper subjects for consideration by their expert witness Van Dyke and also as direct evidence showing lease transactions with comparable property close to the time of taking. Government counsel objected and after protracted argument the court allowed the leases to go in only after all rental figures had been removed.

This was done in compliance with the government's contention that the 30 so-called Convair leases which commenced at the period of the Korean War arose out of necessity on the part of the government for airplane construction and that the rental figures were not arrived at by open, arms-length negotiations. At the time, Convair had a small amount of commercial operation for which the leased property would be convenient, but its real interest arose from the large number of defense contracts received from the government. These provided for compensation by the government to Convair on a cost-plus-fixed-fee basis. The government therefore urged that the United States was essentially the lessee and that the government should not be required to pay, upon condemnation, a value which it had itself created.

At the conclusion of the argument the court granted the government's motion to withdraw the leases with the exception of one, Exhibit 22. (TR. p. 1754)

The government had offered in evidence as a foundation for its objection to consideration of the leases, various contracts between Convair and the government for manufacturing military articles. These were entered into about the time of the execution of the leases. Appellants objected to such offer. The baffling upshot

was that the contracts were admitted and the leases were admitted -- with rental figures deleted except in one instance. The court's explanation to the jury regarding the lease exhibits was as follows:

"Now the court also ruled on the matter of the Convair leases. You will recall that beginning in 1948 and down to well into 1952, on Exhibit 25, which was the comparable lease sheet, the bottom half of it were leases on the subject property, and there was testimony, you recall, of Mr. Watts as to how certain leases after January 1, 1951 were entered into. Mr. Carlstrom was asked, under 42(b), if certain testimony he gave was true as to how the leases were entered into. The court has ruled that all those leases entered into after January 1, 1951, with the exception of one lease, which I will tell you about, are not to be considered as comparables and any testimony you have heard about them you are to forget about and we will run lines through them on Exhibit 25. It is not your business why the court rules, but the court ruled that they were not free and open market transactions because of the compulsion testified to by Mr. Watts and testified to by Mr. Carlstrom.

Incidentally, this doesn't eliminate all of the leases off Exhibit 25; just those after January 1, 1951." (TR. p. 1754)

"The various prices at which portions of the subject property were leased have been admitted into evidence. The rental figures in the Convair leases after January 1, 1951, except Lease 22 on Exhibit

25-S have been excluded and removed from your consideration." (TR. p. 2089, 2090)

Appellants respectfully submit that it was the duty of the trial court to admit all the evidence and exhibits respecting the Convair-Government contracts and the Convair-Carlstrom leases or else to reject all of it. The lease transactions covered the identical properties taken. They were almost contemporaneous with the first taking. Deletion of the rental figures constituted complete emasculation of appellants' offer and admission, at the instance of the government, of the Convair-Government contracts served no purpose whatever unless it was to impress upon the jury the sanctity of any operation in which the government incidentally participates.

Certainly there was no privity between Carlstrom and the United States at the time of execution of the leases. He never could have collected a cent of rent from the government. To give any materiality to these contracts between the United States and private parties it would have to be shown that the latter were virtually attorneys-in-fact or alter egos of the former. This was a question of law for the court and aside from adding to the confusion of the jury it was prejudicial error to pass the question off to the jury. The law relating to government connection with property involved in condemnation proceedings was fully and, we believe, correctly supplied to the trial court in appellants' Memorandum on Admissibility of Convair Leases which is reproduced in the Transcript of Record, page 83-99 and is hereby referred to.

Apparently the court was considerably impressed by the pronouncement of respondent's attorneys that the leases were not admissible because they were not free and arms length transactions. But it would seem to border on the ridiculous to foreclose a property owner from using in evidence of value a lease of the identical property made shortly before condemnation on the ground that the lessee obtained the lease by threatening to condemn if it didn't it! The owner might logically contend that too low a rental was thus exacted but it hardly lies in the mouth of the lessee to contend that too high a rental was exacted by virtue of his threat to condemn. This may be an example of "straight arm" tactics, but it does not destroy the "arms length" character so long as the property owner does not complain!

- E -

The Court Erred in Admitting Evidence
of the Purchase Price Paid by Carlstrom

Over defendants' objection of remoteness the court permitted the government to bring before the jury the price which Carlstrom had paid the government for the Convair Plant. This consideration was agreed upon in 1947, seven years before the taking of the fee in this action. The price paid was \$1,050,000.00. (TR. p. 1507)

It is impossible to overemphasize the significance which this figure must have held in the minds of the jurors. It was the identical property; it was a figure

comprehensible to the average mind. It stood out as the only undisputed sum of money mentioned by any witness in connection with a comparable property sale.

It must have been seized upon by the jury as a veritable floating log in the maelstrom of figures through which the members valiantly sought to battle their way. What a simple means of fixing a sum for award to the owner in a condemnation action! He paid X dollars; he held it Y years; he should receive an increase of Z dollars per year.

All the ratiocination of the experts, all the instructions of the court could not have obliterated this simple formula from the minds of eleven exhausted jurors. Renunciation of it by respondent could not substitute any other available yardstick. Denunciation of it could not supplant the curious course of human nature. Consciously or unconsciously the cost to Carlstrom in 1947 determined the cost to the government in 1955. We venture to assert that it is the single figure which all jurors carried in their minds to the juryroom!

What then? Was Carlstrom's cost a fair and acceptable standard? Was it for the court or for the jury to determine this? Did the admission of the evidence of cost-price in the face of the owners' objection indicate to the jurors that the court approved it as a proper basis for fixing of value seven years later in the swift-moving increase of San Diego real estate values?

To return, now, to the true significance and reliability of the "purchase price plus" method; as ably argued by government counsel in another connection, the

price paid is not a proper factor in and of itself. To be worthy of consideration it must be arrived at in an arms-length transaction, in an open market. Government counsel stressed this point at great length in its plea for withholding from the jury the rental figures in the Convair leases, (TR. p. 1740). There, the trial court, as a matter of law, excluded the lease prices of much later date than the Carlstrom purchase. There the jury was not permitted to pass on the claim of necessity on the part of the government. Yet the necessity of the government was more pronounced at the time of this sale. The War was over, millions had been sunk in acquisition of the land and construction of the so-called Convair Plant. America had been promised "No more Wars". The Plant was too enormous for any one manufacturer. The government had on its hands a veritable white elephant. Its bargain disposal offers went unheeded until Carlstrom came along. A sacrifice price was agreed upon.

In no sense was this an arms-length transaction. The government was under necessity to unload its investment. Carlstrom got it at a bargain because he alone had the foresight to envision the future value of the property for non-military uses and the courage to shoulder the white elephant himself. Though the jury was disposed to allow him what they probably conceived to be a handsome profit, they had no way of measuring the mental anguish involved in the venture, the difficulties and risks of financing it and the laborious years of management in holding it, up to the point where it could be cashed in on the sweeping upturn of the San Diego real estate market.

Whatever application the jury made of all this, the result was purely speculative and there would have been no necessity for it except for the improper admission of the original cost to Carlstrom.

It is true that the jury was given opportunity to reject the figure on the ground of its remoteness, but it is likely that they considered this as a matter of the calendar only. Actually, of course, the intervention of seven years in the rise of San Diego real estate values between 1947 and 1955 was the equivalent of the seventeen preceding years. Of this the trial court had judicial knowledge and it should have applied the bar of remoteness as a matter of law.

In a final effort to undo the prejudice suffered by improper admission of this line of evidence, appellants requested the following in final instructions to the jury:

"Defendants' Instruction No. 41. You are specifically instructed to absolutely disregard the purchase price which was the consideration agreed upon when Mr. Carlstrom acquired the entire subject property on June 31, 1947. Such purchase price has no bearing upon the market value of the various parcels sought to be condemned in fee on June 16, 1955, because it is too remote in time and was made under market conditions which were entirely dissimilar to the conditions of the market on or about the date of the fee valuation. Consequently it would be unjust to the defendant property owners for you to base your verdict upon any consideration of this sale as being direct evidence of the fair market value of the subject

parcels as of June 16, 1955." (TR. p. 203)

This was not accepted by the court and the jury was left to its own devices. (TR. p. 2089)

- F -

The Court Erred in Admitting Evidence
of Carlstrom's Declaration Before the
Board of Equalization

Respondent was permitted to introduce in evidence certain petitions to the Board of Supervisors of San Diego County sitting as a Board of Equalization, signed by Carlstrom in July 1951 (Exhibit N, O). In these, Carlstrom sought reduction in the County Assessor's valuations of the Convair Plant which Carlstrom had acquired three years earlier. For this purpose he naturally belittled the value and emphasized the detrac-tions inherent in the condition and usefulness of the premises at that time. Before the board he testified to like effect.

These assertions were admitted over defendants' objections on the ground that they were declarations of Carlstrom against his interest. Inasmuch as most of the properties were subsequently acquired by the other appellants, the court properly instructed the jury that the declarations of Carlstrom could be considered against Carlstrom but not against Childrens Aid Founda-tion, Inc., the Assemblies of God or the Salvation Army. Appellants memorandum concerning admission of

declarations furnished to the trial court on this subject is reproduced in the printed transcript page 101-112.

Here again is an example of the impossible discrimination demanded of the jury. At the time of taking of the fee in 1955 the charitable organizations were the owners of the bulk of the property. Carlstrom had left only one of the adjoining and similar tracts. Thus the government was demanding of the jury that it accept Carlstrom's 1951 declaration of value as to one house and lot but disregard it as to the similar house and lot next door! Inevitably the jury must have either paid no attention to Carlstrom's campaign before the Supervisors or it must have applied it to all the property which was owned by Carlstrom at the time, including that subsequently acquired by the other appellants.

We may speculate that the jury followed the first alternative. This would have been the proper course, but who can say that it was followed? The government's offer should have been denied by the court not only to avoid the ensuing confusion but because the subject matter of the equalization hearing was no proper criterion of subsequent value. The question before the jury was the true market value in July 1955, not what Carlstrom considered or declared it to be in 1951 for the obvious purpose of minimizing taxes. This had no more bearing on the question of subsequent market value than his possible boast the next day to a friend that he had a property there worth \$10,000,000! Neither puffing or belittling by an owner has any effect on the subsequent true market value. This kind of negotiation talk is therefore not within the field of declarations against interest admissible in court seven years later. The

court should have ruled it out as incompetent testimony.

- G -

The Court Erred in Rejecting Appellants'
Offer of Proof of Fair Market Rental
Value July 1, 1954 to June 30, 1955

Appellants formally offered to prove by their appraiser Mr. Culver that for the lease period July 1, 1954 to June 30, 1955, their properties had a fair market rental value amounting to \$1,390,500. The offer, objection and ruling of the court appear in the transcript, (pages 1439-1441) as follows:

"Mr. Janofsky: I have an offer of proof, your Honor, and it will take just a moment to make it. I would like to make it in order to preserve our record in view of some pretrial rulings.

"At this time, your Honor, I offer to prove on behalf of the defendant Assemblies of God that Mr. Culver, if called as a witness on behalf of the Assemblines, would testify that the fair market rental value of Parcels 5, 6 and 7, respectively, as of the first day of July 1954 ---

"The Court: July?

"Mr. Janofsky: --- that as of the first day of July 1954 and for the lease period July 1, 1954 to and including June 30, 1955, would be as follows: First, Parcel No. 5, \$98,880; second, Parcel No. 6, \$358,440; third, Parcel No. 7, \$376,908.

"Now I would like to make a further offer of proof for the record, your Honor, in furtherance of my position that subsequent purchasers are entitled to be heard, and there I am speaking for the Southern California Children's Aid Foundation, Incorporated; that they are entitled to be heard and present evidence of fair market value, and particularly in view of the fact that on December 22, 1953 the Children's Aid Foundation became the owner of Building 27 and certain surrounding land, and on January 2, 1954 that the Children's Aid Foundation became the owner of Building 24 and certain surrounding land, all of which property is situated within Parcel 9-A.

"Mr. Janofsky: I offer to prove, on behalf of the Children's Aid Foundation, that that organization, by deed of December 23, 1953, did become the owner of Building 27 and surrounding land, and by deed dated January 2, 1954 did become the owner of Building 24 and surrounding land, and further offer to prove on behalf of said defendant, that Mr. Culver, if called as a witness on its behalf, would testify that the fair market rental value of Parcel 9A, as of the 1st day of July, 1954, for the period of July 1, 1954 to and including June 30, 1955, is the sum of \$556,200.

"Mr. McPherson: To which proffer the plaintiff

objects, not as to the form in the matter but upon itself, as being irrelevant, incompetent and immaterial, and upon the further ground that the proffer, of necessity, is incomplete, since by virtue of the court's very correct ruling the rental value for all subsequent terms or portions thereof must be at the same rate fixed commencing August 1, 1953 and the value of the option, whatever it may be determined to be, is compensation in full for the fluctuating market.

"Of course, the defendant, as I understand it, is simply protecting his proffer for annual revaluation. Isn't that right?

"Mr. Janofsky: That is correct. And also preserving our record in regard to the court's ruling on subsequent objections.

"The Court: And you object to the first offer made upon the grounds heretofore stated and upon the record you have made.

"Mr. McPherson: Yes, I understood that the objection went to both, that all of the objections made on the pretrial to that evidence would be available to us here.

"The Court: All right, the objection is sustained..."

Such testimony was material not only in determination of rental values but as an important factor to be considered in determination of the value of the fee estates. Whether these additional figures would have

meant anything to a jury already bewildered, is questionable, but on the score of admissibility, these figures were just as valid and important as the thousands already admitted in evidence.

CONCLUSION

This brief of appellants opened with the observation that this is no ordinary condemnation case. We believe that Section I fully demonstrated that an American jury has never before been confronted with such a multifarious and complicated assortment of takings and issues. Not only to do justice to the appellants here, is a reversal in order, but it may well serve to prevent such impositions upon other juries in the future.

We believe further, that Section II demonstrates a cumulation of erroneous rulings by the court which may be attributed in some degree to the complexities of the case and the desire of all concerned to get through with it by one means or another.


It is true that trial courts have considerable latitude of discretion but when its exercise runs markedly in one direction, as here, and owners are cut off from the only means which are available to measure market value, one after another, the abuse outweighs the discretion.

Appellants submit that on either, and particularly on both, of the grounds herein advanced, the judgment should be reversed and the cause should be remanded.

H. G. SLOANE

RUBIN AND SELTZER

JAMES L. FOCHT, JR.

by 
Attorneys for Appellants

APPENDIX

SUMMARY OF VALUATIONS^{6/}
(14 month term)

	<u>Government</u>		<u>Landowner</u>		<u>Verdict</u>
Parcel 5	Seeley		Shattuck		
(Bldg. 4)	\$55,524	B	\$133,910	B	
(Assemblies)	938	P	3,990	P	
	<u>\$56,462</u>	T	<u>\$137,900</u>	T	
	Mitchell		Culver		
	\$43,680	B	\$108,500	B	
	1,070	P	3,500	P	
	<u>\$44,750</u>	T	<u>\$112,000</u>	T	
	Cotton		Goodwin		
	\$32,400	B	\$118,202	B	
	500	P	1,974	P	
	<u>\$32,900</u>	T	<u>\$120,176</u>	T	\$62,000 -
					Term Total
			Sayer		
			\$107,540	B	\$ 1,600 -
			2,906	P	Parking
			<u>\$110,446</u>	T	(incl. in total)
Option to	Seeley		Shattuck		
renew	\$ 7,258		\$ 30,000		
	Mitchell		Culver		
	\$ 6,400		\$ 30,720		
	Cotton		Goodwin		
	\$ 4,700		\$ 34,336		
			Sayer		
			\$ 32,532		\$17,712

6/ B - basic rent.

P - parking allocation.

T - total rent.

SUMMARY OF VALUATIONS
(14 month term)

	<u>Government</u>		<u>Landowner</u>		<u>Verdict</u>
Parcel 6	Seeley		Shattuck		
(Bldg. 2)	\$130,172	B	\$337,820	B	
(Assemblies)	<u>6,888</u>	P	<u>10,080</u>	P	
	\$137,060	T	\$347,900	T	
	Mitchell		Culver		
	\$138,600	B	\$387,800	B	
	<u>7,875</u>	P	<u>18,200</u>	P	
	\$146,475		\$406,000		
	Cotton		Goodwin		
	\$ 76,125	B	\$359,562	B	
	<u>1,100</u>	P	<u>6,608</u>	P	
	\$777,625	T	\$366,170	T	
					Total
					\$185,000
					(incl.
					\$8,600
					parking)
	Cotton Revised		Sayer		
	\$119,000	B	\$352,917	B	
	<u>1,750</u>	P	<u>9,560</u>	P	
	\$120,750	T	\$362,477	T	
Option to	Seeley		Shattuck		
renew	\$ 17,622		\$120,000		
	Mitchell		Culver		
	\$ 21,000		\$111,360		
	Cotton		Goodwin		
	\$ 17,250		\$104,620		
			Sayer		
			\$106,768		\$52,856

SUMMARY OF VALUATIONS
(14 month term)

	<u>Government</u>	<u>Landowner</u>	<u>Verdict</u>
Parcel 7	Seeley	Shattuck	
(Bldg. 3)	\$139,762 B	\$366,380 B	
(Assemblies)	7,350 P	10,920 P	
	<u>\$147,112</u> T	<u>\$377,300</u> T	
	Mitchell	Culver	
	\$149,100 B	\$407,400 B	
	8,440 P	19,600 P	
	<u>\$157,540</u> T	<u>\$427,000</u> T	
	Cotton	Goodwin	
	\$134,400 B	\$388,430 B	
	2,100 P	7,140 P	
	<u>\$136,500</u> T	<u>\$395,570</u> T	Total
		Sayer	\$202,000
		\$381,544 B	(incl.
		10,334 P	\$9,550 to
		<u>\$391,878</u> T	parking)
Option to	Seeley	Shattuck	
renew	\$ 18,914	\$130,000	
	Mitchell	Culver	
	\$ 22,500	\$117,120	
	Cotton	Goodwin	
	\$ 10,500	\$113,020	
		Sayer	
		\$115,428	\$57,684

SUMMARY OF VALUATIONS
(14 month term)

	<u>Government</u>		<u>Landowner</u>		<u>Verdict</u>
Parcel 9A	Seeley		Shattuck		
(Bldgs. 1, 5,	\$264,586	B	\$507,267	B	
7, 24, 27)	<u>17,906</u>	P	<u>15,400</u>	P	
(Carlstrom)	\$282,492	T	\$522,667	T	
	Mitchell		Culver		
	\$263,900	B	\$607,600	B	
	<u>20,675</u>	P	<u>22,400</u>	P	
	\$284,575	T	\$630,000	T	
	Cotton		Goodwin		
	\$272,500	B	\$554,820	B	
	<u>7,500</u>	P	<u>10,444</u>	P	
	\$280,000	T	\$565,264	T	Total
			Sayer		\$315,000
			\$561,017	T	(incl.
			41,312	P	\$10,850 to
					parking)
Option to	Seeley		Shattuck		
renew	\$ 36,320		\$150,000		
	Mitchell		Culver		
	\$ 40,000		\$172,800		
	Cotton		Goodwin		
	\$ 40,000		\$161,504		
			Sayer		
			\$165,248		\$90,000

SUMMARY OF VALUATIONS
(14 month term)

	<u>Government</u>	<u>Landowner</u>	<u>Verdict</u>
Parcel 9B (disputed ownership)	Seeley \$ 560 B 140 P \$ 700 T	Shattuck -- \$ 840 T	B P T
	Mitchell \$ 560 B 170 P \$ 730 T	Culver -- \$ 1,050 T	B P T
	Cotton \$ 770 B 70 P \$ 840 T	Goodwin \$ 1,064 B -- P \$ 1,064 T	B P T
		Sayer \$ 1,032 T	
Option to renew	Seeley \$ 90	Shattuck \$ 50	
	Mitchell \$ 100	Culver \$ 288	
	Cotton \$ 120	Goodwin \$ 304	
		Sayer \$ 304	
			Total \$700 (including \$100 for parking)
			\$200

SUMMARY OF VALUATIONS
(14 month term)

Parcel 9C (Spur rail- road tracks) (Carlstrom)	<u>Government</u>	<u>Landowner</u>	<u>Verdict</u>
	Seeley	Shattuck	
	B	B	
	P	P	
	<u> -- </u>	<u> -- </u>	
	\$ 5,565 T	\$ 7,560 T	
	Mitchell	Culver	
	B	B	
	P	P	
	<u> -- </u>	<u> -- </u>	
	\$ 7,000 T	\$ 8,400 T	
	Cotton	Goodwin	
	B	B	
	P	P	
	<u> -- </u>	<u> -- </u>	
	\$ 7,000 T	\$ 8,344 T	No verdict Settled by Compromise
		Sayer	
		B	
		P	
		<u> -- </u>	
		\$ 8,433 T	
Option to renew	Seeley	Shattuck	
	\$ 727	\$ 2,500	
	Mitchell	Culver	
	\$ 1,000	\$ 2,304	
	Cotton	Goodwin	
	\$ 1,000	\$ 2,384	
		Sayer	
		\$ 2,484	

SUMMARY OF VALUATIONS
(14 month term)

Parcel X (Bldg. 28) (Salvation Army)	<u>Government</u>	<u>Landowner</u>	<u>Verdict</u>
	Seeley	Shattuck	
	\$ 15,442 B	\$ 15,302 B	
	700 P	448 P	
	\$ 16,142 T	\$ 15,750 T	
	Mitchell	Culver	
	\$ 14,560 B	\$ 20,160 B	
	670 P	840 P	
	\$ 15,230 T	\$ 21,000 T	
	Cotton	Goodwin	
	\$ 12,600 B	\$ 14,784 B	
	350 P	266 P	
	\$ 12,950 T	\$ 15,050 T	
		Sayer	Total
		\$ 16,296 T	\$12,000
		448 P	(incl. \$405 for parking)
Option to renew	Seeley	Shattuck	
	\$ 2,075	\$ 5,000	
	Mitchell	Culver	
	\$ 2,200	\$ 5,760	
	Cotton	Goodwin	
	\$ 1,850	\$ 4,300	
		Sayer	
		\$ 4,800	\$3,428

SUMMARY OF VALUATIONS
(Fee)

Tract A-100 (Bldg. 8)	<u>Government</u>	<u>Landowner</u>	<u>Verdict</u>
Business pro- perties Inc.)	Seeley	Stallard	
	\$191,000 B	\$ 468,310 B	
	<u>8,000 P</u>	<u>11,690 P</u>	
	\$199,000 T	\$ 480,000 T	
	Mitchell		
	\$191,000 B		
	<u>9,000 P</u>		
	\$200,000 T		
	Cotton		\$275,000
	\$204,000 B		(incl.
	<u>10,000 P</u>		\$7,500 for
	\$214,000 T		parking)
Tract A-101 (Bldg. 1)	Seeley	Shattuck	
(Salvation Army)	\$553,000 B	\$2,526,000 B	
	<u>34,500 P</u>	<u>49,000 P</u>	
	\$587,500 T	\$2,575,000 T	
	Mitchell	Culver	
	\$462,000 B	\$ B	
	<u>38,000 P</u>	<u>83,000 P</u>	
	\$500,000 T	\$2,650,000 T	
	Cotton	Goodwin	
	\$563,700 B	\$1,925,000 B	
	<u>44,000 P</u>	<u>32,000 P</u>	
	\$607,700 T	\$2,457,000 T	\$1,146,000
			(incl.
		Sayer	\$49,600
		\$2,385,000 B	for
		<u>48,000 P</u>	parking)
		\$2,433,000 T	

SUMMARY OF VALUATIONS
(Fee)

	<u>Government</u>	<u>Landowner</u>	<u>Verdict</u>
Tract A-102	Seeley	Shattuck	
(Bldgs. 2, 3,	\$1,648,500 B	\$5,915,000 B	
4, 28)	90,000 P	\$ 112,000 P	
(Assemblies)	\$1,738,500 T	\$6,027,000 T	
	Mitchell	Culver	
	\$1,365,000 B	\$6,115,000 B	
	100,000 P	185,000 P	
	\$1,465,000 T	\$6,300,000 T	
	Cotton	Goodwin	
	\$1,635,000 B	\$5,950,000 B	
	115,000 P	79,500 P	
	\$1,750,000 T	\$6,028,500 T	\$2,830,000
		Sayer	(incl.
		\$5,787,000 B	\$111,500
		115,000 P	for
		\$5,902,000 T	parking)
Tract A-106	Seeley	Shattuck	
(disputed	\$ 6,600 B	\$ B	
Convair, As-	600 P	-- P	
semblies and	\$ 6,600 T	\$ 7,500 T	
Salvation	Mitchell	Culver	
Army)	\$ 6,800 B	\$ B	
	700 P	-- P	
	\$ 7,500 T	\$ 10,000 T	
	Cotton	Goodwin	
	\$ 5,850 B	B	
	650 P	-- P	
	\$ 6,500 T	\$ 9,000 T	\$30,000
		Sayer	(incl. \$700
		B	for
		-- P	parking)
		\$ 10,000	

-x-

SUMMARY OF VALUATIONS
(Fee)

	<u>Government</u>	<u>Landowner</u>	<u>Verdict</u>
Tract A-107 (Bldg. 24) (Children's Aid)	Seeley \$ 49,000 B 2,500 P \$ 51,500 T	Shattuck \$ 75,500 B 1,500 P \$ 77,000 T	B P T
	Mitchell \$ 42,000 B 3,000 P \$ 45,000 T	Culver \$ -- \$ 80,000 T	B P
	Cotton \$ 52,000 B 3,000 P \$ 55,000 T	Goodwin \$ 75,000 B 900 P \$ 75,900 T	B P T
		Sayer \$ 80,000 B 1,500 P \$ 81,500 T	B P T
			\$49,000 (incl. \$1,300 for parking)
Tract A-108 (Bldg. 27) (Salvation Army)	Seeley \$107,000 B 7,000 P \$114,000 T	Shattuck \$174,000 B 3,000 P \$177,000 T	B P T
	Mitchell \$ 72,000 B 8,000 P \$ 80,000 T	Culver \$ 4,500 P \$200,000 T	P T
	Cotton \$111,500 B 8,500 P \$120,000 T	Goodwin \$ 2,100 P \$164,100 T	B P T
		Sayer \$171,000 B	B
			\$122,000 (incl. \$2,400 for parking)

SUMMARY OF VALUATIONS
(Fee)

	<u>Government</u>	<u>Landowner</u>	<u>Verdict</u>
Tract A-109	Seeley	Shattuck	
(Bldg. 7)	\$ 154,500 B	\$ 355,000 B	
(Carlstrom)	<u>10,500 P</u>	<u>6,500 P</u>	
	\$ 165,000 T	\$ 361,500 T	
	Mitchell	Culver	
	\$ 128,000 B	\$ 321,000 B	
	<u>12,000 P</u>	<u>9,000 P</u>	
	\$ 140,000 T	\$ 330,000 T	
	Cotton	Goodwin	
	\$ 152,000 B	\$ 339,000 B	
	<u>13,000 P</u>	<u>4,500 P</u>	
	\$ 165,000 T	\$ 343,500 T	
		Sayer	\$ 195,000
		\$ 347,000 B	(incl.
		<u>7,000 P</u>	\$ 5,400 for
		354,000 T	parking)
Tract A -120	Seeley	Shattuck	
(S. water	\$ 14,000 B		B
tank)	<u>1,000 P</u>	--	P
(Assemblies	\$ 15,000 T	\$ 37,500 T	
and Salvation	Mitchell	Culver	
Army jointly)	\$ 19,000 B	\$	B
	<u>1,000 P</u>	--	P
	\$ 20,000 T	\$ 46,000 T	
	Cotton	Goodwin	
	\$ 14,000 B	\$	
	<u>1,000 P</u>	--	P
	\$ 15,000 T	\$ 44,000 T	\$ 22,000
		Sayer	(incl. \$300
		\$	for
		--	parking)
			P

SUMMARY OF VALUATIONS
(Fee)

	<u>Government</u>		<u>Landowner</u>		<u>Verdict</u>
Tract A-121	Seeley		Shattuck		
(Bldg. 5 and	\$126,500	B	\$378,000	B	
N. Water	<u>4,500</u>	P	<u>12,000</u>	P	
tanks)	\$131,000	T	\$386,000	T	
(Assemblies					
and Salvation	Mitchell		Culver		
Army jointly)	\$150,000	B	\$		
	<u>5,000</u>	P	<u>--</u>	P	
	\$155,000	T	\$400,000	T	
	Cotton		Goodwin		
	\$162,000	B	\$		
	<u>3,000</u>	P	<u>--</u>	P	
	\$165,000	T	\$330,000	T	
			Sayer		\$208,000
			\$	B	(incl.
			<u>--</u>	P	\$1,700 for
			\$409,000		parking)

FOR THE NINTH CIRCUIT

No. 16128

CHARLES W. CARLSTROM, et al ,

Appellants,

vs.

SUMMARY OF VALUATIONS
(Fee)

	<u>Government</u>		<u>Landowner</u>		<u>Verdict</u>
Tract A-121	Seeley		Shattuck		
(Bldg. 5 and	\$126,500	B	\$378,000	B	
N. Water	4,500	P	12,000	P	
tanks)	\$131,000	T	\$386,000	T	
(Assemblies					
and Salvation	Mitchell		Culver		
Army jointly)	\$150,000	B	\$		
	5,000	P	--	P	
	\$155,000	T	\$400,000	T	
	Cotton		Goodwin		
	\$162,000	B	\$		
	3,000	P	--	P	
	\$165,000	T	\$330,000	T	
			Sayer		\$208,000
			\$	B	(incl.
			--	P	\$1,700 for
			\$409,000		parking)

FOR THE NINTH CIRCUIT

No. 16128

CHARLES W. CARLSTROM, et al,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATE OF CALIFORNIA)

) ss

COUNTY OF SAN DIEGO)

Rita Thaanum, being first duly sworn, deposes and says: That this affiant is a citizen of the United States of America, a resident of the County of San Diego, over the age of eighteen years, not a party to the within and above entitled action; that this affiant is making this service for H. G. Sloane, Rubin and Seltzer and James L. Focht, Jr., the attorneys for Appellants in this action; that this affiant is of the firm of San Diego Offset Printing Company, 930-5th Avenue, who are the printers and agents in this matter for said attorneys, and have their offices in the City of San Diego, State of California.

That on the 14th day of July, 1959, affiant served the within Appellants' Opening Brief on the Appellee in this action by placing true copies thereof in envelopes addressed to the attorneys of record ~~xx~~ for said Appellee at the business addresses of said attorneys, as follows: three copies thereof to Laughlin E. Waters, United States Attorney, Albert N. Minton, Assistant United States Attorney, 821 Federal Building, Los Angeles 12, California; three copies thereof to Perry W. Morton, Assistant Attorney General, 25, Washington 25, D. C.; and then sealing said envelopes and depositing the same, with postage thereon fully prepaid, in the United States Post Office at San Diego, California.

That there is delivery service by United States mail at the places so addressed or there is a regular communication by mail between the place of mailing and the places so addressed.

Rita Thaanum

Rita Thaanum

Subscribed and sworn to before me
this 14th day of July, 1959.

Laura Thaanum

Notary Public in and for said
County and State

(SEAL)

My Comm. Expires May 14, 1963



**In the United States Court of Appeals
for the Ninth Circuit**

CHARLES W. CARLSTROM, SOUTHERN CALIFORNIA CHILDREN'S AID FOUNDATION, INC., A CORPORATION, SOUTHERN CALIFORNIA DISTRICT COUNCIL OF THE ASSEMBLIES OF GOD, INC., A CORPORATION, AND THE SALVATION ARMY, A CORPORATION, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES, APPELLEE

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FILED

OCT - 9 1959

PAUL P. O'BRIEN, CLERK

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In the United States Court of Appeals for the Ninth Circuit

No. 16128

CHARLES W. CARLSTROM, SOUTHERN CALIFORNIA CHILDREN'S AID FOUNDATION, INC., A CORPORATION, SOUTHERN CALIFORNIA DISTRICT COUNCIL OF THE ASSEMBLIES OF GOD, INC., A CORPORATION, AND THE SALVATION ARMY, A CORPORATION, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The opinion of the District Court is reported *sub nom.*, *United States v. 70.39 Acres of Land*, 164 F. Supp. 451. Although not germane to the present appeal, an earlier opinion of this Court involving a tax matter arising out of the same case is *County of San Diego v. United States*, 251 F. 2d 534 (1958).

JURISDICTION

This is an appeal from the final judgment of the district court in a condemnation proceeding entered on November 26, 1957 (R. 255-300). Notice of ap-

peal was filed by the defendants Charles W. Carlstrom; Southern California Children's Aid Foundation, Inc.; Southern California District Council of the Assemblies of God, Inc.; The Salvation Army, a California corporation; and The Salvation Army, a New York corporation (herein collectively "appellants" unless otherwise indicated), on March 12, 1958 (R. 301-302). Although it was not included in the printed record, the defendants filed a motion for a new trial on the issues of just compensation on December 3, 1957, which was denied on January 20, 1958.¹ The jurisdiction of the district court over the condemnation proceeding rested on 28 U.S.C. sec. 1358. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether the consolidation of term and fee takings of the same property for a single trial by the district court was an abuse of discretion.
2. Whether the cost of rehabilitating the property for its highest and best use is admissible in evidence.
3. Whether the district court properly eliminated from cross-examination repetitious and remote questions which threatened to prolong the trial unduly.
4. Whether the district court was in error to reject detailed figures as to reproduction costs when other evidence of a more reliable character was available.

¹The United States had filed a motion for new trial as to Tract A-106 which was granted on March 14, 1958, unless all interested parties filed a remittitur for everything over \$8,000. Such remittitur was subsequently filed.

5. Whether leases made by a government contractor to secure space urgently needed for the manufacture of military aircraft during a national emergency may be considered as evidence of fair market value.

6. Whether the district court was correct in ruling that (a) a previous sale of the same property and the landowners' admissions against interest in a tax proceeding were admissible and (b) evidence of the rental value of the property 14 months after the date of taking was not admissible.

STATEMENT

In this eminent domain proceeding the United States took, first, an estate for years and, subsequently, the fee in a portion of an aircraft plant at San Diego, California. The plant had been built by the United States during World War II for the use of Consolidated Vultee Aircraft Corporation, commonly known as Convair, which is now a division of General Dynamics Corporation. After the war the plant, variously referred to as Convair Plant #2, Consolidated Plant #2, or Plancor #20, was declared surplus and disposed of in several pieces. The original plant, complete, contained 92 acres (R. 1076). While approximately 70 acres were condemned, by the time of trial the just compensation for only 46.9 acres remained to be determined (R. 1054). This portion of the original plant consisted of three immense aircraft assembly buildings (identified in these proceedings as Buildings 1, 2 and 3), a paint shop (Building 7), a utilities building (Building 5), two office buildings (Buildings 4 and 24), two cafeteria buildings (Buildings 27 and 28), and a drop

hammer building (Building 8) (R. 494-499). These buildings contained approximately 1,565,266 square feet of floor space (Tr. 3036).² See Defendants' Exhibits Nos. 32 and 119 for area statistics on all buildings except No. 8 (R. 2166, 2190). The defendant, C. W. Carlstrom, had purchased the 46.9 acres and the buildings described above in May 1948 from the Government for \$1,050,000 (R. 2169). Shortly after he purchased the property, Mr. Carlstrom sold Building 8 with 93,000 square feet of land for \$108,900 (R. 2169). The major leases on the property between the date it was sold to Carlstrom and the term taking are set forth in Dft. Ex. No. 25-S, and in the testimony of Mr. Sayer (R. 1237-1286, 2160). Gross rentals of approximately \$2,350,000 were received from these major leases up to the date of the term taking, May 1, 1953.³ Over two million dollars of these rentals had been received from the Government's contractor, Convair, mostly under leases made after the beginning of the Korean War (*id.*).

The United States filed its original complaint in condemnation on April 29, 1953 (R. 3-8). The estate taken was a term for years commencing May 1, 1953, and ending June 30, 1954. It was extendible for yearly periods thereafter at the option of the United States until June 30, 1958, with notice of its election

² When the reference is to the printed record, the initial "R." precedes the page number. When the reference is to portions of the reporter's official transcript of the trial which is in the record but not printed, the initials "Tr." precede the page numbers.

³ Rentals from Parcel 1, Building 8, are excluded from this gross.

to be filed at least 30 days prior to expiration of the previous term (R. 5). With the complaint there was filed a declaration of taking of the interests described in the complaint (R. 7). At the time a large portion of the condemned property was already leased to and occupied by Convair. The proceedings were brought because the rentals were believed to be too high and because there were several lessees of other portions of the condemned property, some with unexpired terms running to as long as 1968. On May 19, 1954, the United States filed its notice of election to extend the term for a one-year period from July 1, 1954, to June 30, 1955 (R. 257-258). Another notice of election to extend the term for one year from July 1, 1955, to June 30, 1956, was filed on May 31, 1955. Before this last term commenced, however, the United States filed its declaration of taking to enlarge the term taking to a taking in fee simple (R. 258). In some instances there were delays of several months after the required proceeding was instituted before possession was delivered to the United States. The various proceedings relating to the granting of possession and holding over of certain lessees will not be covered fully here as it is not important to the issues on this appeal. Prior to May 1, 1953, Mr. Carlstrom had conveyed to various charitable organizations the fee and appurtenant easements for individual buildings in the condemned plant. Insofar as pertinent, the consideration for these conveyances and the circumstances surrounding them will be developed later. Those owners or lessees found to have an interest in the term taking that had not

been previously settled by stipulation are set forth in the final judgment (R. 281-283). Those instances where settlements have been stipulated are also set out in the final judgment (R. 294-296). To distinguish the two, the property included in the term taking is described in "parcels", while the property in the fee taking is described in "tracts".

At pre-trial hearings and during the trial numerous questions of law were raised by the many lawyers representing the various defendants and the United States. To a large extent the questions of law were disposed of before the trial started in January 1957. The rulings of the district court on these issues of law are mostly covered by four pre-trial orders and supporting memorandums. These orders and memorandums are reported in *United States v. 70.39 Acres of Land*, 164 F. Supp. 451 (S.D. Cal., 1958). Pre-trial orders Nos. 1 and 4 are relatively unimportant, being concerned with procedural matters. The bulk of the rulings is in Pre-Trial Order No. 2, covering those issues of law on the term taking, and Pre-trial Order No. 3, similarly covering the fee taking.

The case was tried before a jury which returned the following verdict (R. 260-261):

Parcel No.	Fair market value of 14-month term	Fair market value of option to renew	Parcel No.	Fair market value of 14-month term	Fair market value of option to renew
5.....	\$62,000	\$17,712	9-A.....	315,000	90,000
6.....	185,000	52,856	9-B.....	700	200
7.....	202,000	57,684	X.....	12,000	3,428

Tract No.	Fair market value	Tract No.	Fair market value
A-100.....	\$275,000	A-108.....	\$122,000
A-101.....	1,146,000	A-109.....	195,000
A-102.....	2,830,000	A-120.....	22,000
A-106.....	30,000	A-121.....	208,000
A-107.....	49,000		

Based on the jury's award for the 14-month term, the court made the following award (12/14ths less abatement) for the extended 12-month term (R. 275) :

<i>Parcel No.</i>	<i>Amount</i>
5.....	\$50,928.55
6.....	151,964.24
7.....	165,928.53
9-A.....	258,749.92
9-B.....	575.00
9-C (less that portion thereof designated Tract A-119 in the fee acquisition).....	5,980.00
X.....	9,857.14

In addition to the awards based on the jury verdicts, the following parcels and tracts were settled by stipulation (164 F. Supp. 451, 460) :

Parcel 1, term taking (same property as Tract A-100 in fee).....	\$76,552.07
Parcel 9-C, term taking.....	14,880.00
Parcel 10-A, term taking (Midway).....	23,034.15
Parcel 10-A, term taking (Ace Van).....	1,552.85
Tracts A-110-119, fee taking.....	69,300.00
Tract B-200, fee taking (Ace Van).....	61,750.00
Tract B-201, fee taking (Midway).....	617,500.00

An appeal from the judgment of the district court was taken as to all tracts and parcels tried before the jury except Parcel 1, Tract A-100 (Building 8), and Parcel A-119 (part of the railroad spur appurtenant to Building 8). Although the notice of appeal mentions Tract A-100, the appellants have no interest in this tract (R. 301-302, 290).

The case presented to the jury

While appellants' principal point is that the jury was confused, their brief fails completely, we believe, to set forth a statement of the case which gives any fair summary of what occurred at the trial. Almost every paragraph of the little more than three pages which, according to the index of the brief, is the statement of the case required by Rule 18(2)(c) of this Court, contains argumentative charges of confusion. We believe, therefore, that a rather detailed statement in chronological order is required. In testing the validity of appellants' claim of confusion it should be borne in mind that the evidence, as we relate it, was presented to the jury in a period from January 2 to May 27, 1957, with some recesses, during which the jurors would naturally develop detailed knowledge as to the plant and its surroundings.

There is printed in the record, between pages 364 and 2197, the essential case presented to the jury, with cumulative materials eliminated to the best of counsel's ability. Insofar as pertinent to issues other than complexity of the jury case, certain portions of the record between the above-mentioned pages contain matters presented outside the hearing of the jury.

There are also printed in Volume VI of the record those exhibits which are principally summaries of the experts' testimony on fair market value of the property taken and comparable sales and rentals.

As the jury was being chosen, the district court explained the general nature of the case and the issues to be decided (R. 364-375). The court told the jury the case was both simple and complex. It was simple in that there were only simple issues to decide. Stated generally, the issue as to the fee taking was "when the Government took the entire title what was the fair market value of this property?" (R. 364). The other issue was the fair market value of the leasehold which the Government took. "* * * you will have to decide what the fair market value of the 14 month leasehold was and the fair market value of the option to renew" (R. 365). The case is complicated "in that there is involved a large piece of ground and parts of a large industrial plant, large buildings and equipment" (R. 365). The district court informed the jury that three things were taken, a lease beginning May 1, 1953, for 14 months, and an option to renew that lease from year to year until 1958, the renewal of the lease for the second year, and then the taking of the fee title about two weeks before the second term expired (R. 367). "You are not to be concerned with the apportionment of values which you may place on certain parcels between various people * * *," the court warned, "your function is to decide what the particular parcels were worth * * *" (R. 367-368).

the County of San Diego, viz, Plant 2 or Plancor 20, to park on Parcel 10A (R. 390). This right to park free of charge was limited to 6 a.m. to 6 p.m. Mondays through Fridays, and ran until approximately 1962 (R. 390). The parking privilege was available for 3,000 cars (R. 394). Mr. Burrill stated the position of the defendants that the highest and best use of each parcel was as part of a unitized airplane manufacturing plant (R. 409). Mr. Burrill pointed out that there was nothing on the ground at the plant to mark the various parcels, or to designate the inplant road (R. 410). All the plant area not covered by buildings is surfaced with concrete or macadamized pavement (R. 411).

The next attorney to make his opening statement for the defendants was Mr. Janofsky, representing Children's Aid Foundation and Assemblies of God (R. 420). Mr. Janofsky reiterated the buildings owned by his clients and further described them (R. 421-427). Mr. Janofsky stated defendants' position that the leases of portions of the plant made to Convair prior to condemnation were among the best evidence of the highest and best use of this property (R. 431). The defendants also intended to offer the leases to support their figures on fair market rental value (R. 440).

Mr. Horton, representing the former owners of Parcel 1, Building 8, the drop hammer building, made a brief opening statement (R. 441-444). Mr. Horton told the jury that his client, the fee owner, was not interested in the leasehold taking because that taking was a matter between the Government and his client's

tenant (R. 442). He explained the nature of a drop hammer and the physical condition of this property (R. 442-443). He also noted the railroad siding available to this parcel and the parking privileges (R. 443-444).

Mr. Moran, representing Convair, and Mr. Archer, representing Lyon Van and Storage which was leasing a portion of Building 1 on the date of taking, were not allowed as lessees to be heard unless the other parties were not adequately presenting the case (R. 399, 444).

The opening statement for the Government was made by Mr. McPherson (R. 446-482). Mr. McPherson first concerned himself with the question whether the individual parcels taken could be unitized (R. 451). Mr. McPherson noted that the original plant contained 92.8 acres and had 50 structures, although approximately 20 of these were minor structures of no consequence (R. 451). The plant was designed as an auxiliary to Convair's main plant, No. 1, Plant No. 2 being used as a subassembly or parts assembly plant (R. 451-452). Of the total area in the original plant under roof, 2,470,000 square feet, 821,000 square feet was sold to the County of San Diego, or others, or retained by the Government, while Mr. Carlstrom received 1,649,000 square feet with his purchase (R. 454-455). 23.6 acres of the original plant land area was in the parking lot (R. 452). This was sold to the San Diego baseball club, with parking privileges for not to exceed 3,000 cars reserved for employees of any business conducted in the original plant for a period

of 15 years (1962) (R. 455-456). Mr. McPherson described the buildings in the area sold to Mr. Carlstrom (R. 456-459). After Mr. Carlstrom acquired the property, he sold Building 8 to Gregory Electric on June 17, 1948 (R. 459). On December 27, 1952, Mr. Carlstrom made an outright gift of Building 28, the cafeteria building, to Salvation Army (R. 461). Mr. Carlstrom also made a series of partial gift transfers in 1951 to the Assemblies of God of Buildings 2, 3 and 4 (R. 462). Mr. Carlstrom made complete gifts of Buildings 24 and 27 to Children's Aid Foundation (R. 462). An important feature of these gifts and partial gift and sale transactions was the Easement Plan Agreement (R. 463). Each of the buildings in the plant was served by numerous service facilities, sewer lines, water lines, power lines, gas line, steam lines, etc. (R. 464). Around each of the buildings conveyed, Mr. Carlstrom reserved to himself a strip of land so that the right of access to and from these buildings was very limited (R. 464-465). The Easement Plan Agreement required the severance by Assemblies and Salvation Army, after they got Building No. 1, of these service facilities within 180 days after demand by Mr. Carlstrom (R. 466-467). Mr. McPherson pointed out that the vehicular overpass was not conveyed to Mr. Carlstrom except as to the abutments resting on his land, and that the other abutment was on land of the United States (R. 469). The court interrupted Mr. McPherson's opening statement when he mentioned comparable sales and leases to explain what these terms meant (R. 472). Mr. McPherson then generally discussed comparable sales

and leases (R. 473-477). Mr. McPherson concluded with general remarks on highest and best use (R. 478-482).

At the conclusion of Mr. McPherson's opening statement, the district court elaborated on a reference to the 14-month term and the subsequent 12-month term. Value would be determined by the jury for the 14-month term and the option to renew. The 12-month term would then be ascertained by taking $1\frac{2}{14}$ ths of the jury's award for the 14-month term (R. 482-485).

Condition of property on May 1, 1953

The first witness called by the appellants was John M. Burlake who testified as to the condition of the condemned property, except Parcel 1, Building 8, on May 1, 1953 (R. 486-669). Mr. Burlake was an appraiser with the American Appraisal Company and gave the usual statement of qualifications⁵ (R. 486; Tr. 752-761). Mr. Burlake was familiar with and had examined in great detail all the buildings involved in the trial except Parcel 1, Building 8 (R. 487). Mr. Burlake first visited the property in the fall of 1952, and later in May 1953 and June 1955 (R. 487-491). Mr. Burlake gave the measurement of the buildings and described the grounds outside the buildings (R. 495-505). The outside area was generally paved with asphaltic concrete pavement (R. 500). On the east-erly side of the property was a standard gauge rail-road industrial siding. (*Id.*) There were two large

⁵ Since the qualifications of expert witnesses are not at issue on this appeal, they have been generally omitted from the printed record.

wooden tanks and concrete pump houses at both the north and south end of the plant (R. 502-503). There was explained in great detail the physical characteristics of the three large buildings, all of which were similar except that Building 3A was annexed to Building 3 (R. 506-549). The buildings were 36 feet high having mezzanines above the ground floor at the side of the buildings, which were 40 feet wide, and run the full length of the buildings in two tiers (R. 507, 508, 520). The buildings were resting on large steel piles, with a reinforced concrete platform poured on top (R. 511-513). The framing of the buildings was steel and had a "skin" of corrugated, galvanized steel (R. 517-519). A portion of Building 1 was closed off by tenants who rented part of the building (R. 522). A series of doors opens up the end of the buildings (R. 524). Within the buildings and connecting between them is a craneway system designed so that it can cover in one run all the way from the north end of Building 3 to the south end of Building 1, traversing Building 2 in the process (R. 525, 527). The buildings are wired with numerous electric lighting and power facilities (R. 530-533). Each building has five large elevators (R. 533). Mr. Burlake next described Building 7, the paint shop, which was in a straight line with the three main assembly buildings previously described (R. 549-557). It was similar in basic construction and design with the other buildings (R. 550). Building 5, the utilities building, is located north of Building 3 and is a metal clad steel frame building similar to the other buildings (R. 557-565). The equipment in Building 5 includes three

steam boilers and auxiliaries, a water heater, water softening system, vacuum pump, three steam pumps, cellar drainer pump, two air compressors, an air conditioning unit, two 20 kilowatt DC motor generators, and to the north of the building are six 10,000-gallon steel underground tanks for gasoline and diesel oil (R. 561-564). Building 4 is a two-story steel frame building with stuccoed exterior walls (R. 572). The interior is plaster. There are continuous runs of steel sash windows, and the floors are finished with asphalt tile mostly (R. 574-575). The next buildings described were numbers 27 and 28, the cafeteria buildings which were practically duplicates of each other (R. 578-583). These buildings were not built on steel piles as the other buildings were (R. 579). They were wood framed with the exterior a flat sheet asbestos siding (R. 580). The interiors of the buildings were divided into serving, kitchen and dining areas (R. 581). Building 28 contained a refrigerator and other cafeteria equipment, but Building 27 did not and was being used for other purposes on the date of valuation (R. 581-583). The last building Mr. Burlake testified about was Building 24 (R. 583-586). This was a one-story wood frame building used for office purposes. It had no masonry foundations and rested on mud sills (R. 584). Mr. Burlake then described the various systems found in the yard area, sewer lines, air lines, storm drains, telephone lines, oil lines, domestic water system, sprinkler supply system, water tanks, natural gas distribution system, fire alarm system, steam lines, electrical distribution system, and public address system (R. 586-608). Mr. Burlake was next

questioned on the condition of the various buildings and improvements as of May 1, 1953 (R. 610-669). The cross and redirect examination of Mr. Burlake is not printed (Tr. 983-1022). Cross-examination is generally not included in the printed record since it is by its nature merely elaboration of basic information already presented to the jury.

The former owners of Parcel 1, Building 8, called Bruce Stallard to testify on the physical condition of their property as of the date of taking (R. 669-670). Since these defendants are not parties to this appeal, the complete account of the testimony is not printed (Tr. 1025-1054).

The United States called John E. Hallock as its expert witness on the physical condition of the property as of May 1, 1953 (R. 671-1005). Mr. Hallock was an engineer with the Donald R. Warren Company (R. 672). The witness' qualifications have been omitted (Tr. 1054-1060). Mr. Hallock first visited the property in November 1953 (R. 673-674). If Mr. Hallock were asked to describe the structural elements of the buildings, how they were put together, etc., it would be approximately the same as Mr. Burlake's (R. 676). This was also true of Mr. Stallard's testimony on Parcel 1 (R. 677). Mr. Hallock determined in his examination of the property what would be required for repairs to bring it up to a normal standard for carrying on industrial or commercial work in these buildings (R. 677-678). To illustrate his testimony there was introduced in evidence a series of photographs showing specific defects in the property (R. 688-690). The United

States later called Henry D. Smith, plant engineer for Convair at San Diego, who testified that in his opinion the photographs represented the condition of the plant on May 1, 1953 (R. 713-714). The condition of each building and the defects found therein were itemized by Mr. Hallock as follows: Building 1 (R. 690-722), Building 2 (R. 722-730), Building 3 (R. 730-737), Building 4 (R. 737-751), Building 5 (R. 751-758), Building 7 (R. 758-765), Building 24 (R. 765-768), Building 28 (R. 768-771), and yard paving and facilities (R. 771-785). Mr. Hallock did not testify on either Building 8 or Building 27 (R. 785). While covering only a small portion of Mr. Hallock's testimony on condition of the plant, the following are typical items: In Building 1 there were in excess of 4,000 cases of broken glass (R. 693). The interior underside of the roof and the whole roof structure need painting to prevent corrosion (R. 697). The unit heaters which heated the buildings had been severely used and were damaged (R. 705-706). The panels for the electric system were damaged or missing or had faulty circuit breakers in some instances (R. 715-716). In Building 2 the underground soil and waste lines and the sewer lines under the floor had been damaged due to settlement of the soil, as was true of Building 1 (R. 728). The catwalk over the roof of Building 3 was unsafe and needed much repair and painting (R. 733). In Building 4, 20,000 square feet of asphaltic tile was "of no use at all" (R. 737). The ceiling in Building 4 had sagged down, dropped out or was in waves (R. 742). Building 5, the power

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plant, was in fairly good condition structurally, but the inertia blocks were causing trouble, and caused vibrations to a great extent in the rest of the building (R. 751-752). Partitions in Building 28 were gone and the cement floor in the kitchen area was so badly pitted that it was not conducive to cleanliness (R. 766). In the yard area there are a number of places where the paving has sunk to the extent that it no longer drains into the storm drain system (R. 772). Several parts of the public address system were missing (R. 786).

Mr. Hallock gave his opinion of the aggregate cost of bringing the property in this trial to a condition where it would be usable and useful for industrial purposes. The total of his estimated cost was rounded out to \$1,478,600 (R. 801-802). The court gave the jury an instruction on how it was to consider this evidence, pointing out that it was not evidence of fair market value (R. 802-809). The costs of rehabilitation were merely factors which a willing buyer and a willing seller might consider. It was for the jury to decide whether those dealing in the marketplace would take into account in this instance the costs to put the property in a usable, suitable condition (R. 803). Mr. Hallock was cross-examined at length on the details of the rehabilitation costs (R. 809-1005). There was a breakdown of each rehabilitation item by building, starting at page 840 of the record and continuing through page 944. A slightly revised summary of rehabilitation costs was given at the conclusion of this cross-examination reaching a grand total of \$1,383,800, reduced from \$1,478,600

he testified to on direct examination (R. 945-947). The other thing covered by cross-examination was Mr. Hallock's experience and background (R. 809-812).

Landowners' evidence on term taking

The following witness for the appellants was James H. Van Dyke (R. 1005-1016). Mr. Van Dyke testified that in his opinion the portion of Plant 2 in this trial "was suitable for industrial purposes, including the use of manufacture of airplane parts, aircraft components, subassemblies and final assemblies of all but the larger aircraft" (R. 1007). The summarization of the 10 factors on which Mr. Van Dyke's opinion was based was given at the conclusion of his direct examination (R. 1009-1010). These included the flexibility of production areas, ease with which the space could be utilized, adequate parking available, adequate inplant feeding, accessibility of receiving and shipping materials and products manufactured, good circulation between the buildings, good storage space adjacent to the production areas, well distributed toilet facilities, adequate office space and room for other supporting facilities, and excellent material handling facilities. Mr. Van Dyke's opinion was based only on the areas of the plant here at issue except Parcel 1, Building 8 (R. 1010-1011). The exclusion of Parcel 1, and the area now owned by the County and the United States to the north of the plant, would not change his opinion. These areas would be desirable but not absolutely necessary (R. 1012-1013). Most of Mr. Van Dyke's testimony, both

direct and cross, has been excluded from the printed record (Tr. 1489-1642).

The court followed Mr. Van Dyke's testimony on the highest and best use for a unitized plant with a discussion on unitization addressed to the jury (R. 1016-1026). The court summarized the diverse positions of the defendants that there was a reasonable probability that all the property in the term taking could have been joined in a unit, and the Government's position that the property being split into different ownerships it was not reasonably feasible to unitize it (R. 1016-1017). The court stated that it was a question for the jury to determine whether this property was reasonably susceptible of unitization in the immediately foreseeable future after May 1, 1953 (R. 1017). The property could be unitized only if the various owners, without the power of eminent domain, could agree and pool their interests (R. 1018).

Gladys Boyer was called as a witness by the appellant, Salvation Army (R. 1027-1029). Brigadier Boyer was an officer of the Salvation Army, and testified that at no time had the Salvation Army considered using Building 28, Parcel X, for its religious and charitable purposes. F. C. Woodworth was called by the appellant, Assemblies of God (R. 1029-1031). Mr. Woodworth was a district supervisor with Assemblies. Mr. Woodworth testified that Assemblies held Parcels 5, 6 and 7 for investment or income-producing purposes rather than for use directly in its church activities.

The first real estate expert to testify on fair market value of the term taking for the appellants was John

N. Sayer (R. 1049-1337). Mr. Sayer's qualifications appear in the original transcript at pp. 1914-1931. Mr. Sayer first told the work he did to prepare himself to form an opinion of the rental value (R. 1049-1078). He determined the nature of the estate taken (R. 1049). The physical property was inspected (R. 1049-1050). The assessed value for tax purposes and tax rates, including the possibilities of any changes, was investigated (R. 1050). Mr. Sayer secured information on other sales and leases in the San Diego area (R. 1050-1051). He formed an opinion of supply and demand for the uses of the subject property (R. 1051-1052). The location of the subject property was analyzed relative to residential areas, major highways, trackage facilities and downtown San Diego (R. 1052). The physical measurements of the individual parcels, buildings and open areas were measured and inserted in the record by stipulation (R. 1052-1060). Mr. Sayer secured an inventory of the items to be included in the appraisal (R. 1060-1061). He obtained estimates of the cost of reproduction of the property as of May 1, 1953 (R. 1061-1062). Mr. Sayer discussed "observed depreciation" and "functional depreciation" and explained to the jury what he meant by these terms (R. 1063-1064). Mr. Sayer ascertained the dates on which the buildings were erected and their remaining life (R. 1065). He studied a report by Mr. Van Dyke on the functional and design characteristics of the buildings (R. 1065-1066). Reports of the San Diego Chamber of Commerce pertaining to their economy were obtained (R. 1066). The owners and ten-

ants of the property were determined (including the purpose for which the owner had the property) and the rentals being paid (R. 1067-1068). Mr. Sayer secured information pertaining to parking facilities available (R. 1068). At this point there was introduced in evidence the parking agreement between the agencies of the United States and the San Diego baseball club relating to Parcel 10A, the parking lot across Pacific Highway from the plant (R. 1068-1078). The court explained its ruling to the jury that the parking agreement allowing 3,000 cars to park between 6 a.m. and 6 p.m., Mondays through Fridays, for a period of 15 years accrued to the benefit of the entire 92 acres in Plancor 20, of which the 46 acres on trial here are a part. "So the ruling of the court was that the property shown on Exhibit A * * * as part of its value has the benefits, such as they are, flowing from this agreement, Exhibit 7" (R. 1077). The provision in the deed was read to the jury (R. 1074-1075). As a result of his studies, Mr. Sayer arrived "at certain things which [he] considered or did not consider * * *" (R. 1078-1079). He took into consideration the terms and conditions of the leasehold estate taken, including the option to extend for four yearly periods (R. 1079). He considered the location of the property with respect to downtown commercial areas and residential areas (R. 1079-1080). He considered the accessibility of the subject property to surrounding streets, highways, and freeways (R. 1080). A detailed discussion of this access followed (R. 1081-1096). Mr. Sayer considered the physical facilities, the type, size, and layout of the

improvements and the fixed building equipment (R. 1096). Leases and sales of other properties in the San Diego area were considered, with various degrees of weight being given to such data because of lack of comparability (R. 1097). There were introduced in evidence by the defendants pictures of various buildings at the plant (R. 1097-1105). Mr. Burrill then introduced in evidence Exhibit 10, a map showing comparable sales (R. 1104-1105).

At this point, the court discussed the significance of whether the property could be unified when considering whether a sale was comparable or incomparable (R. 1105-1108). It was the defendants' contention that the property could be unitized, with over 46 acres of land, and therefore there are no sales comparable to this unit. It was the contention of the United States that the property would have to be sold or leased as parcels or buildings, with the highest and best use of some of the large buildings being multiple tenancies. The court also reminded the jury that the owner was entitled to the highest and best use of which the property was susceptible regardless of actual use being made of it.

Mr. Sayer then proceeded to list the leases and sales he considered in arriving at fair rental value for the property involved in this trial (R. 1108-1294). The details of the individual leases and sales will not be reviewed in this statement. Insofar as these leases and sales were admitted in evidence for the jury's consideration, they are summarized in two exhibits. (See R. 1887-1888.) The leases considered by defendants' experts and applicable to the leasehold tak-

ing, i.e., those made before May 1, 1953, together with similar leases considered by plaintiff's experts, are collected in Exhibit 25-S (R. 2160; Tr. 3007-3008). The sales are shown on Exhibit 57⁶ (R. 2168). Prior to the trial, the Government and the defendants exchanged data on the transactions their experts considered (R. 1110). On Defendants' Exhibit 10, all the transactions were listed whether they were originally discovered by the Government or by the defendants (R. 1110-1111). Exhibit 10 covers leases and sales not only in the term taking but the fee taking as well (R. 1112). Therefore the court cautioned the jury that May 1, 1953, for the term, and June 16, 1955, for the fee, are cut-off dates and transactions appearing thereafter cannot be considered on the fair market value of the leasehold or fee (R. 1113). Mr. Sayer then identified by number the leases he had considered for the term taking (R. 1114-1118). He was then questioned on the details of each lease (R. 1118-1193). Next Mr. Sayer gave the list numbers and details of the sales he considered (R. 1193-1223).

At this point the court informed the jury that as the trial progressed it would try to give the jury some tentative instructions so they would know what counsel are shooting at in the case (R. 1223). This instruction was in connection with the leases between Convair and the defendant-owners of certain portions of the property involved (R. 1225). If these leases were free market transactions they could be consid-

⁶ Sales occurring both before and after May 1, 1953, are listed on this exhibit. The witness testified as to which of the sales originally listed on Exhibit 10, and later on Exhibit 57, he considered (R. 1193-1201).

ered by the jury in arriving at the fair market value of the property (R. 1226). Whether they were free market transactions was a question for the jury. (*Id.*) The Government contended that they reflect an increase over fair rental because of the compelling necessity of the Government acting through its contractor, Convair. The defendants contend this is not true. The general rule is that the Government should not be required to pay for value which the Government itself has created. A distinction must, however, be noted. If, because of the Government's activities in and around San Diego, the Navy Base, Air Station, private plants doing government business, etc., there has been a general increase in rental and land values, then to the extent such general increase is reflected in the Convair leases the Government may not complain (R. 1226-1227). If, on the other hand, there is an increment in the Convair leases caused by the necessity of the Government acting through Convair for facilities of the particular kind and in the particular area close to Convair Plant No. 1, then such increment must be segregated by the jury and not considered in fair market value (R. 1227). The court then instructed that in considering capitalization of rental income it must be rental that could be expected over a sustained period (R. 1229). The jury was instructed to keep its eyes on the ultimate issue, fair market value (R. 1230). Comparable leases as to the leasehold taking and comparable sales as to the fee taking are the best evidence of fair market value. The court then noted the elements of comparability, distance from subject property, differences in size,

structure, access, date of the transaction, and other common sense factors (R. 1230-1231). If the jury finds there are no comparable sales or leases it may consider other matters to assist it in arriving at fair market value, such as opinions of experts and reasonable capitalization of net rental income if the jury is convinced that such rentals would have continued over a reasonably sustained period in the future (R. 1231).

Mr. Sayer then resumed with testimony that he considered the leases mentioned earlier not directly comparable, but they were helpful in various portions of the over-all appraisal (R. 1233). Mr. Sayer then testified on the various lease transactions of the subject property between Convair and the owners (R. 1234-1294).⁷ Mr. Sayer stated that the leases C, F,

⁷ These leases are as follows:

Lease C, Building 1, total area 211,000 square feet; term 59 months from April 1, 1951, to February 28, 1956, with option to cancel March 31, 1954; rental \$5,000 for one month, \$17,490 for 34 months, \$16,600 for 24 months, cancellation bonus \$95,000, average monthly rental for full term of 8¢ per square foot of leased area (R. 1237-1247).

Lease F, Building 2, entire building; lease dated January 10, 1951, and amended March 9, 1951; original term of lease 24 months, January 1, 1951, to December 31, 1952, amended term 52 months to April 30, 1955; option to cancel April 30, 1953; rental (as amended) \$5,000 for one month, \$18,725 for five months, \$23,000 for 12 months, \$30,300 for 10 months, \$31,500 for the 24-month optional term, plus real estate taxes, average monthly rental for full term of 6.9¢ per square foot of leased area (R. 1247-1257).

Lease L, entire Building 3 and annex (3A); lease dated January 10, 1951, amended February 8, 1951; original term 28 months to April 30, 1953, option to renew for 24 months to April 30, 1955; January 10, 1951, lease superseded another lease of portions of building which had not expired (see Exhibit 25-S, R. 2160); rental for the firm term \$15,056 per

L, O and N were, as a group, very comparable in his opinion to the property being tried in this trial (R. 1293-1294).

Mr. Sayer continued with the other factors he had considered in forming his opinion of the fair market rental value of the subject property. The next factor was ownership of the subject parcels with their size and characteristics with the thought of forming an opinion as to the probability of unitization (R. 1294-1295). At this point, the court interrupted to advise

month, optional term \$34,237.50 per month plus real estate taxes, average monthly rental for full term of 5.6¢ per square foot of leased area (R. 1260-1265).

Lease M, 58,500 square feet of Building 4, the office building; lease dated February 8, 1951; term of 59 months April 1, 1951, to February 28, 1956, with option to cancel March 31, 1954; for the first 36 months the rental averages \$11,196 per month, for the optional term \$10,822.50 per month, cancellation bonus \$65,000, average monthly rental for full term 18.9¢ per square foot of leased area (R. 1277-1281).

Lease N, the utility building, Building 5; lease dated January 10, 1951, superseded a prior lease which had not yet expired, amended February 8, 1951; original term 28 months to April 30, 1953, option to renew for 24 months to April 30, 1955; rental \$1,500 per month (R. 1266-1269).

Lease O, entire Building 7; lease dated October 10, 1951; term of 59 months October 1, 1951, to August 31, 1956, with option to cancel September 30, 1954; average rental over first 36 months \$5,147, cancellation bonus \$15,900, last 23 months optional term at \$5,300 per month, average monthly rental for full term 11.1¢ per square foot of leased area (R. 1269-1276).

Lease Q, 3,000 square feet of Building 24; lease dated December 1, 1952, terminated earlier lease which had not expired; term of nine months cancellable on 30 days' notice after May 31, 1953; rental \$600 per month (R. 1283-1286).

Lease T-2, 6,000 square feet of vacant land for a term of one year from January 1, 1953, to December 31, 1953, rental \$250 per month (R. 1825-1286).

the jury that since unitization was a question for the jury to decide, it would not let the expert witnesses testify to their ultimate conclusion on unitization. The jury was entitled to hear all the facts and then make its decision without being told what the expert's opinion is (R. 1295-1296). Mr. Sayer considered the availability of free parking for nine years after the date of taking (R. 1296). Real estate taxes were considered (R. 1298). The cost of being a comparable facility and the depreciated reproduction cost were considered also (R. 1299).

Mr. Sayer was next asked his opinion of the highest and best use of the subject properties (R. 1300). The United States objected to this witness giving his opinion because there was nothing in the record to show whether there was a reasonable probability of the individual parcels being unitized, and no testimony at all on the highest and best use factors relating to separately owned parcels (R. 1300-1301). The court ruled there was no magic in the order of proof and that the expert could give his opinions and then his reasons (R. 1302). The jury then left the courtroom for argument of counsel (R. 1303). At the resumption of the jury hearings the court ruled that the question of unitization is a question of fact for the jury to determine. (*Id.*) Mr. Sayer then gave his opinion that the highest and best use of the subject parcels is for industrial use, including manufacturing, assembling and related activities (R. 1304). Mr. Sayer's opinion of the fair market rental value for the 14-month term was given (R. 1305-1326). The testimony was broken down by total rental, parking rights and value of the

option to renew. The figures will not be given here, as they are repeated in tabular form in Appendix A, attached to appellants' brief. The testimony was summarized for the jury in Defendants' Exhibit No. 28 (R. 2162).

Mr. Sayer concluded his direct testimony by giving the reasons for the values which he had expressed (R. 1326-1336). Prospective tenants would weigh the cost of reproducing or replacing a facility against rental cost of an existing property (R. 1327). The terms of the taking are favorable to the tenant, giving him the option to renew (R. 1327). The subject land has substantial plottage value because of the improbability of assembling another tract of 43 acres so close to downtown San Diego (R. 1327-1328). The size and design of the facilities of Buildings 1, 2, 3, 5, and 7 are adequate to meet the demands of utilization of this property for its highest and best use (R. 1328). Mr. Sayer, on whether the several parcels could be unitized, considered that there were only four owners, that the property was designed to be used as a single property, that prior to May 1, 1953, the property had already been substantially unitized, that the maximum use of the utility system—the craneway, rail facilities, yard and dock areas, power-plant and standby water tanks—could be had by unitization, that an advantage would accrue to the owners by leasing to a single tenant, and that other properties equally complex have within his experience been unitized (R. 1328-1332). The parking facilities available without cost enhance the rental value (R. 1332). Mr. Sayer considered the real estate taxes,

and stated that there is no tax protection clause in the lease (R. 1332). Mr. Sayer was permitted to give, over the objection of the United States, the assessed value of the property and the amount of taxes indicated thereby (R. 1333-1334). Mr. Sayer considered that the Government had the right to approve or disapprove each of the leases of the subject property (R. 1335). The rentals being paid under leases C, F, L and O of approximately 8 cents for ground floor area and 4 cents for mezzanine area compare favorably with Mr. Sayer's conclusions of 7 cents and 3½ cents respectively (R. 1335-1336). The cross and redirect examinations appear in the original transcript at pp. 2444-2633.

The next witness called on behalf of the appellants was real estate expert Ewart Goodwin (R. 1337-1364). Mr. Goodwin's testimony followed the same format as Mr. Sayer's. He gave his qualifications, his acquaintance with the property, the studies he made to prepare his appraisal, and the factors he considered in arriving at his opinion. Since the testimony was largely cumulative it has been omitted from the printed record (Tr. 2635-2696). Mr. Goodwin then testified that in his opinion the highest and best use of the subject property is for industry and manufacturing, including manufacture of small aircraft parts, assembly or manufacture of pleasure boats, furniture, and any sheet metal parts, and that the property was satisfactory not only for manufacturers of air frames such as Convair, but also Rohr, Solar and Ryan in the San Diego area (R. 1337). Mr. Goodwin gave his reasons for his opinion of the

highest and best use (R. 1338). These included that the design of the buildings was desirable for the particular purposes, that anyone using the buildings for this purpose would want a labor pool, including engineers, which is available in the San Diego area, that San Diego offers many "fringe benefits" to induce workers to come to this area, and that the "stretch-out" program of the United States adopted in 1952 and 1953 resulted in a stability in the aircraft industry not previously known, and it had a basic effect on the entire industry of the United States (R. 1338).

Mr. Goodwin gave his opinion of the fair market rental value for the 14-month term (R. 1338-1353). These figures were summarized for the jury in Defendants' Exhibit #29 (R. 2163). A résumé for this Court is given in Appendix A of appellants' brief. Mr. Goodwin continued his testimony with the reasons for the opinions of market value just expressed (R. 1354-1364). The property was ideal in shape and layout, lying between the Santa Fe Railroad and Pacific Highway (R. 1354). There was a good relationship between land and buildings, 1,075,000 square feet of land covered in buildings with a surrounding 734,000 square feet of vacant land area (R. 1354). The plant has "particularly desirable access for a property located on a high traffic street such as Pacific Highway" (R. 1357). The pedestrian overpass and the vehicular overpass to the south were considered (R. 1357-1358). The property was located four miles northwest of Fifth and Broadway in downtown San Diego (R. 1358). Industrial employment in San Diego was 50 per cent greater in May, 1953 than in

1950 (R. 1358-1359). There was a labor pool in San Diego, with an adequate supply of skilled workers, especially in metal work (R. 1359). At the date of taking there was very little close-in industrial land available (R. 1359). Mr. Goodwin considered the amount of penalty rent or bonus rent that should be paid for the option to cancel (R. 1360). The various sales and leases were not comparable, "worthy of comparison on the one hand; but, on the other hand, * * * they were capable of comparison in some respects" (R. 1361-1362). Because of the shortage of warehouse space a manufacturer would be justified in renting the entire property because there were many users for portions of the property with whom he could share the rent burden (R. 1362). San Diego enjoyed a growth between 1946 and 1953, with economic components such as retail sales, building permits, electric power sales and manufacturing employment, indicating very firm business conditions (R. 1364). The cross and redirect examinations are not given in the printed record (Tr. 2747-2818).

David F. Culver, another real estate expert, was called for the appellants following Mr. Goodwin (R. 1364-1381). Again the printed record is limited to the highest and best use and value opinions and the reasons therefor. The qualifications and preparations for the appraisal are omitted (Tr. 2835-2864). Mr. Culver found the highest and best use of the property to be for industrial uses, that is, assembly, subassembly or general manufacturing (R. 1364-1365). Mr. Culver then stated his opinion of fair market value for the 14-month term (R. 1365-1376). The figures were pre-

served for the jury in Defendants' Exhibit #30 (R. 2164). They are also included in Appendix A of appellants' brief. The reasons for the market value which Mr. Culver expressed were the tremendous growth in population and very substantial industrial development in the San Diego area (R. 1376). This substantiated his opinion that there was a demand for industrial properties in the area. The property being 46 acres in size, rather than a smaller area, was important (R. 1376). It was important that there were approximately 1,500,000 square feet of "building areas" (floor space) on the property (R. 1377). The buildings were in fair to good condition on May 1, 1953. The trackage available was important for this type of property. It was important that ownership was largely concentrated in two owners (R. 1377). Mr. Culver considered whether the owners were on friendly terms and the fact that from 1951 to May 1953 the major portion of the plant had been unitized. The Convair leases were important. The access he found important, the fact that the property has access to a service road paralleling Highway 101, and has adequate access in the southerly direction from Rosecrans Street, and also a two-way access to the south from Washington Street (R. 1378). Adequate parking facilities were available and parking rights running with the occupant or owner or lessee of the subject property. The term of the leases, 14 months, was for a period considerably less than would be the normal practice. The fact that the lessee had the option to renew at the same rental was important to Mr. Culver. Mr. Culver had information on a number

of sales and leases but did not consider any of these transactions directly comparable to the subject property with the exception of the leases of this property from 1951 to 1953 (R. 1378-1379). Mr. Culver considered the things that might be brought out in negotiations between the owner and a prospective lessee. These included the taxes, certain charges to management, vacancies, reasonable upkeep and repair, interest charges "contributable" to the land and improvement values, depreciation, and the parking value (R. 1379-1380). Another consideration that would be given substantial weight was what he would have to pay if he had the owner construct a new building (R. 1380). Also, the lessee would consider how much it would cost to build a new plant himself (R. 1380). The cross and redirect examinations have been omitted (Tr. 2885-2943).

The final witness on the term taking for the appellants was Charles B. Shattuck (R. 1381-1422). Mr. Shattuck's qualifications, knowledge of the subject property and what he considered in making his appraisal are not printed (Tr. 2949-2969). His testimony is, for present purposes, substantially the same as the earlier experts (R. 1382). Mr. Shattuck's opinion of fair market rental value was illustrated for the jury on Defendants' Exhibit #24 (R. 1385-1400). It is also included in the appendix to appellants' brief. This being the first exhibit giving a summation of the expert's testimony, the ones previously referred to being introduced later in the case, the court instructed the jury on their use (R. 1385-1386; Exhibit #24 is found at R. 2150). The summations

were merely illustrative and not direct evidence. They were to assist the jury later in the jury room in refreshing their recollection of the testimony, and so the jury could make comparisons of the testimony of the various experts. Mr. Shattuck then gave the reasons in support of the opinion of fair market value he had just given (R. 1401-1422).

Although none of the cross-examination of Mr. Shattuck has been printed (Tr. 3031-3109), there is one feature which must be noted. In accordance with the district court's ruling that expert witnesses must be prepared to testify to the value of the parcels on a segregated or unitized basis, Mr. Shattuck was asked on cross-examination for his figures on a segregated basis (Tr. 3079-3090). The summation of this testimony is found in Defendants' Exhibit #26 (R. 2161).

The above record concludes the case for the defendants on the term taking. There follows the case presented by the United States.

Government evidence on term taking

The first witness for the United States was Robert B. Watts, vice president and general counsel of the Convair Division, San Diego, of General Dynamics Corporation (R. 1423-1507). Since 1949, Mr. Watts has been the officer whose duty it was to negotiate for the acquisition and disposal of real estate (R. 1423-1424). There had been made for Mr. Watts a tabulation of military contracts by fiscal years from 1947 to 1953 which were performed by Convair at San Diego (R. 1424). This tabulation was introduced as Plain-

tiff's Exhibit J, which was received in evidence for the limited purpose of illustrating the witness' testimony (R. 1425, 1451). The exhibit showed the type of contract, cost plus fixed fee, fixed price, etc., the description, i.e., broad subject matter of the contract such as B-36 components. The exhibit showed whether Convair was prime or subcontractor, the purchase order number, the "go-ahead date", the date of the definitive contract, the contract number, and the fiscal years in which the contract was active (R. 1444-1451). Mr. Watts testified as to the number of military contracts which were active during each fiscal year, 1948 through 1953 (R. 1454-1455). The court struck the answer as to 1953 because the witness did not know how many were active before May 1 (R. 1455). Mr. Watts then described in chronological order the lease negotiations for use of space in Convair Plant #2, excluding Building 1. There were five leases in the pre-Korea category (R. 1456-1459). There was no manufacture of commercial planes at San Diego between August 1949 and March 1951 (R. 1458). A lease was made in May 1950 on the eve of the Korean War (R. 1459-1461). Other leases followed the outbreak of the Korean War (R. 1461-1470). In this testimony Mr. Watts related the military contracts which necessitated the various leases. At one point, Mr. Carlstrom refused to lease any more space to Convair because he wanted to develop multiple tenancies of his buildings, and if there came a time when Convair no longer needed the property he would get the whole thing back at one time (R. 1463-1464). Mr. Watts, needing the space for the military

contracts, told Mr. Carlstrom that he was prepared to have the property condemned by the Air Force if necessary (R. 1464). Mr. Carlstrom's terms involved increased rentals (R. 1464). Having advised the Air Force of the terms, Mr. Watts proceeded to accept, "because I had to. We had to have the space" (R. 1464). Mr. Watts gave the terms as revised and the history of Convair's contract for the F-102 fighter plane, and told about the termination of leases in April 1953 in preparation for the condemnation of Plant #2 (R. 1464-1472). The direct examination of Mr. Watts was concluded with a recital of the mechanics by which the United States reimbursed Convair for the rentals paid by Convair (R. 1473-1475).

On cross-examination, Mr. Watts was questioned on whether some of the Convair leases made in 1950 were for storage space instead of production area (R. 1475-1483). He was then examined on what commercial planes had been built by Convair during the period of these leases (R. 1484-1489). They had built the "240" commercial airliner in the period prior to August 1949 (R. 1487). In March 1951 they started work on a new commercial plane, the "340", and finished the first model about a year later. (*Id.*) During the year 1950 only about 5% of their total work was commercial, that "small percentage represented by any miscellaneous parts manufacture which was going on at that time" (R. 1488). There was further explanation on the cross-examination of how the Government reimbursed Convair for the rentals paid at Plant #2 (R. 1488-1495). All rentals paid were placed in an "overhead" account, and allocated on the basis of di-

rect labor dollars expended on the several contracts (R. 1490). Mr. Watts was also cross-examined on the amount of control which the Government exercised over Convair's operations (R. 1495-1501). While the Government before awarding a contract would make sure the contractor had adequate facilities, it did not specify that it must be performed in a particular building (R. 1500-1501).

On redirect, Mr. Watts testified that all but about 5% of the rents paid in 1950 by Convair were reimbursed by the Government. For all the years in this general area 1951, 1952, etc., 85% or more of the rentals paid were reimbursed by the Government (R. 1501-1503).

After Mr. Watts had finished, the court summarized for the jury what the contentions of the parties would be with respect to this testimony (R. 1503-1507). The court explained the position of the Government that the Convair leases were not free and open market transactions, and that the leases were based on the necessity of the Government for these particular facilities. On the other hand, the defendants would contend that Convair was an independent contractor, and that there was no direct agency between the activities of Convair and the Government.

C. W. Carlstrom was called by the Government under Rule 43(b) as a hostile witness. Mr. Carlstrom testified that he acquired the property here in question from War Assets Administration on May 4, 1948, for \$1,050,000 (R. 1507). Mr. Carlstrom was also asked about the efforts he made to sell or lease the property, the gross yield he received from it, and

the statements that Mr. Carlstrom had made in 1951 when he petitioned to have tax assessments on this property reduced (R. 1508-1509).

The first real estate expert to testify for the Government on the term taking was John Cotton (R. 1509-1605). Mr. Cotton's qualifications are not printed (Tr. 3322-3331). Mr. Cotton testified on the things he did to acquaint himself with the property. He inspected the properties (R. 1511). He determined the nature of the estate taken. He interviewed Mr. Carlstrom. The contractor who originally constructed the plant was interviewed (R. 1512). The manner and extent of the taking of the access for Highway 101 were determined. Mr. Cotton secured information on the nature of the parking agreement on the baseball club property. He studied the neighborhood. He procured information on the original 92.8 acres which originally comprised Convair Plant No. 2 with its 2,441,236 square feet of building space, and information regarding the 735,000 square feet of building space that had been sold to the County (R. 1513). Mr. Cotton checked on the industrially zoned property, and the amount of property available at the date of valuation (R. 1514). He reviewed property and business trends in San Diego (R. 1514-1515). Mr. Cotton checked to see if there were any potential large space users in the area, and whether Rohr Aircraft Co., Solar Aircraft Co. or Ryan Aircraft Co. had any interest in acquiring space at the subject property prior to May 1, 1953 (R. 1516). He studied leases on other industrially zoned property (R. 1516-1517). Mr. Cotton agreed with Mr. Burlake as to the

structures present on the property and with Mr. Hallock as to their condition (R. 1518-1520).

Mr. Cotton continued with the factors he considered in formulating his opinion of highest and best use and fair market value (R. 1520-1581). Mr. Cotton considered the individual parcels in relation to each other and in relation to other property in the neighborhood (R. 1520-1521). Mr. Cotton explained the ingress and egress which each building had (R. 1522-1527). He contrasted the new industrial buildings being built in the area with these buildings (R. 1527-1529). The several ownerships of the subject parcels and the various leasehold occupancies were considered for the probability of unitization of the subject properties (R. 1529-1530). The highest and best use of the property individually and unitized was considered. Mr. Cotton considered the single purpose construction of the subject properties in their initial design when they had been part of a unitized auxiliary plant, and made comparisons with other single purpose properties occupied for other than their originally intended purpose (R. 1531). Mr. Cotton found the present property unique, especially in the three immense buildings which are not equaled in San Diego except in Convair Plant No. 1 (R. 1532). It was found that Plant #2 was located near San Diego Municipal Airport, yet large manufacturing plants producing aircraft have located not nearby an airport but upon an airfield (R. 1534). There was no way this plant could be integrated with use of space on an airfield except in connection with Convair Plant #1. During the time Mr. Carlstrom was

offering the plant for rent Rohr Aircraft, as to some portion of the buildings, considered it, but leased property elsewhere (R. 1535). Ryan Aircraft and Solar Aircraft knew of its availability but had no use for it. Convair itself had no need for the property for any commercial operation and its expanded use was necessitated only by its urgent needs in defense contracts. There was consequently no demand for this property as an integrated plant (R. 1535). This was on the theory of unity of ownership between Carlstrom, Assemblies and Salvation Army (R. 1536). But on investigation it was found that the conveyances between the parties as to easement plans appear to place the parties at arm's length positions.

Mr. Cotton considered the manner in which an owner-investor could utilize the property in leasing it for multiple occupancy of the kind and size more predominant in San Diego (R. 1538). Mr. Cotton then testified on the leases which he considered comparable, all of which are contained on Exhibit 25 (R. 1540-1564, 2160). Mr. Cotton also testified on certain leases he did not consider comparable (R. 1564-1567). There were introduced in evidence certain easement agreements concerning the utility services, sewer, water and storm lines, electrical conduit, steam pipe, gas pipe, etc., to be furnished to the individual parcels (R. 1567-1580). Mr. Carlstrom reserved the fee interest in the main lines, pipe, conduits, etc. (R. 1573). Mr. Carlstrom granted a nonexclusive right to use the railroad siding (R. 1574). Mr. Carlstrom also granted easements 25 feet in width from the building to the nearest public street (R. 1574). If at any time Mr.

Carlstrom should require, the grantee will immediately at its own expense sever all utility services facilities and install separate independent systems (R. 1575). While the agreement read in the record related to Building No. 2, those relating to Buildings 3 and 4 were generally the same (R. 1576, 1569). A similar agreement relating to Building 28 was also read (R. 1578-1580).

Mr. Cotton then gave his highest and best use for the property (R. 1581-1583). In his opinion this would be as follows:

Parcel 9A (Buildings 1, 5, 7, 24 and 27)—industrial use, with emphasis upon multiple use for warehousing, mercantile distribution, light manufacturing, and possible limited commercial use of Pacific Highway frontage.

Parcel No. 5 (Building 4)—office space for occupancies not requiring proximity to the central business district.

Parcel No. 6 (Building 2)—industrial occupancy.

Parcel No. 7 (Buildings 3 and 3A)—industrial use with emphasis on warehousing, mercantile distribution, multiple occupancy for light manufacturing purposes.

Parcel X (Building 28)—limited commercial or light industrial purposes.

Parcel 9B (Vacant land)—light industrial use such as contractor's office and yard.

Parcel 9C (railroad spur)—carloading purposes in connection with adjoining property.

The property would not have a higher or better use even if there was a reasonable probability of unitization (R. 1583). Mr. Cotton then gave his opinion of

fair market value for the 14-month term taking (R. 1586-1590). This information was summarized for the jury in Plaintiff's Exhibit R (R. 2191). It is also included in the appendix of appellants' brief. There was a subsequent correction as to the value of Parcel No. 6, Building 2, because after Mr. Cotton had testified the court ruled if Assemblies should be forced under the easement agreement to sever utility services they would have a way of necessity to bring in new services from the outside (R. 1646-1655).

Mr. Cotton then gave the reasons which prompted his determination of highest and best use and fair market value (R. 1590-1605). Parcel 9A enjoyed complete freedom of access to both sides of the inplant road, to the pedestrian overpass crossing Pacific Highway, to the outer highway and frontage road, to the ingress from the north from Rosecrans Street, and the ingress and egress from the south by way of the 55-foot easement to Washington Street subject only to the prospect of using some of that 55 feet for widening Pacific Highway (R. 1590-1591). Buildings 2, 3 and 4 had only limited access (R. 1591). Building 28 had good access. The parking rights were valuable for the pro rata portion of each parcel to park 3,000 cars for limited daytime periods (R. 1592). Another reason for his valuation is the central supply system of utilities other than electricity and the burdens upon the several parcels other than 9A, 9B and 9C (R. 1594). There was a leveling off in the spring of 1953 of the uptrend in San Diego's econ-

omy which had followed the Korean War (R. 1594-1595). Mr. Cotton then discussed the individual parcels and the several buildings separately (R. 1595-1605). The cross-examination of Mr. Cotton is not printed (Tr. 3470-3556).

During the weekend recess after Friday, March 1, 1957, Mr. Burrill, of the firm of Hill, Farrer & Burrill, representing Salvation Army and Mr. Carlstrom, died. A recess was granted while defendants could arrange for substitution of counsel. Mr. Albert J. Day and Mr. John N. McLaurin replaced Mr. Burrill for Hill, Farrer & Burrill. In addition, the firm of Luce, Forward, Kunzel & Scripps, represented by James L. Focht, Jr., was associated on behalf of Mr. Carlstrom (Tr. 3347-3351). Court reopened without objection on March 21, 1957, and the court explained to the jury the substitution of counsel (Tr. 3369-3371).

The second real estate expert who testified for the Government on the term taking was Fred B. Mitchell. Mr. Mitchell's statement of his qualifications is not printed (Tr. 3557-3569). Nor are the following parts of his testimony: his acquaintance with the property; studies he made to prepare himself for making an appraisal (Tr. 3592-3609); and the comparable leases, which are included in Exhibit 25 (Tr. 3609-3627; R. 2160). Mr. Mitchell then recited the factors he considered in arriving at his opinions of highest and best use and fair market value (R. 1606-1616). These included the approaching end of the Korean War in April 1953, the limited parking rights, the attitude

of business toward buildings built at another time and for a specific purpose, the remoteness of finding an occupant who could utilize an entire building, and the cost of adjusting the buildings to the needs of users (R. 1606-1609). Mr. Mitchell discussed the attributes of specific buildings (R. 1608-1616). The highest and best uses for the several parcels were as follows:

Parcel 9A (Buildings 1, 5, 7, 24 and 27)—light industrial use, some commercial value including automobile parking (R. 1618).

Parcel 5 (Building 4)—light industrial use which would include offices (R. 1618).

Parcel 6 (Building 2)—light industrial or manufacturing use (R. 1618).

Parcel 7 (Building 3)—light industrial or manufacturing use (R. 1618).

Parcel X (Building 28)—commercial or light industrial (R. 1619).

Parcel 9B (vacant land)—light industrial use (R. 1619).

Parcel 9C (spur tracks)—railroad use (R. 1619).

The direct examination continued with the reasons for the highest and best use assigned to each parcel (R. 1619-1622). Among the reasons recited were the limited access these buildings had to a public street, the dimensions of the buildings, the multiple uses in relation to parking, and the fact that the buildings were designed at a different time for a specific need. The probability of unitization was then discussed. Mr. Mitchell did not think the separate parcels would have a higher use on a unitized basis because of the size

of an employer who could use the whole plant and the tendency toward modern type buildings designed for a specific purpose rather than adapting old buildings (R. 1621-1622). Mr. Mitchell concluded with his fair market value (R. 1622-1627). These were summarized for the jury on Plaintiff's Exhibit S (R. 2192). The values are also included in the appendix of appellants' brief. The cross and redirect examination of Mr. Mitchell is not printed (Tr. 3660-3797).

The district court instructed the jury that the petitions for reduction of tax assessments were only admissible against defendant Carlstrom and, in some instances, Assemblies of God. The court pointed out that the exhibits relating to the year 1948 and, to a lesser extent, 1951, might also be considered too remote. Also, when they speak of the assessed value, it is usually no more than 25% to 40% of actual value. The court had the clerk write on Exhibits N and O, "As to Carlstrom and Assemblies only" and on P and Q "admitted as to Carlstrom only" (R. 1629-1636). Certain portions of these petitions were read into the transcript but have not been printed (Tr. 3880-3929). Mr. Carlstrom was recalled under Rule 43(b) and testified that he made no substantial repairs to the property after he had signed Exhibit P, the petition relating to 1948 (Tr. 3929-3930).

The final real estate expert for the Government on the term taking was Roy C. Seeley (R. 1636-1646). Mr. Seeley's qualifications, the preparations he made, and the factors he considered, combined with the

reasons for his opinions, have not been printed here (Tr. 3933-3978). Mr. Seeley gave his opinion of the highest and best use of each parcel. This was commercial and light industrial (R. 1636-1637). Mr. Seeley then gave his opinion of fair market value for the term taking (R. 1638-1646). These values were summarized for the jury on Plaintiff's Exhibit U (R. 2193). They are also contained in the appendix of appellants' brief. The cross-examination of Mr. Seeley has been omitted from this record (Tr. 3994-4115).

The fee taking

In the fee taking, the property was divided into "tracts" rather than "parcels". This was merely a device for convenience to separate the term taking from the fee taking. Counsel were allowed to make separate opening statements for the fee taking. The first was by Mr. Janofsky representing Assemblies of God and Children's Aid Foundation (R. 1655-1677). This third phase of the case is to value the fee title as of June 16, 1955, in the condition in which the property was in May 1953 (R. 1656). In common parlance the fee title is the absolute ownership of the property (R. 1657). Mr. Janofsky then pointed out the tracts on Exhibit V, and explained the ownership of each, as follows (R. 1657-1666):

Owner	Tract	Building
Business Properties, Inc.	A-100	8 (drop hammer building).
Salvation Army	A-101	1 (large manufacturing building).
Assemblies	A-102	2 (large manufacturing building), 3 and 3A (large manufacturing buildings), 4 (office building), 28 (cafeteria building).
Disputed between Assemblies, Salvation Army, and Convair.	A-106	(Vacant land).
Children's Aid Foundation	A-107	24 (office or security building).
Salvation Army	A-108	27 (cafeteria or woodworking building).
Carlstrom	A-109	7 (paint shop).
14/20 Assemblies	A-120	2 south watertanks.
6/20 Salvation Army	A-121	2 north watertanks and Building 5 (utility building).
Carlstrom	A-110 adjoins A-109	} Railroad spur tracks.
Salvation Army	A-111 adjoins A-101	
Assemblies	A-112 to 118 adjoin A- 102.	
Business properties	A-119 adjoins A-100	
Parking privileges appurtenant to above property.	B-201	Parking lot.

During the above recital with respect to tracts in divided ownership, the court explained again to the jury that they merely had to return the verdict for the parcels or tracts, and were not concerned with individual interests therein (R. 1661-1662). Mr. Janofsky gave the jury a detailed account of the transfers of property from Mr. Carlstrom to Assemblies of God, Salvation Army and Children's Aid Foundation subsequent to May 1, 1953 (R. 1667-1671). Mr. Janofsky mentioned that "the jury's first and the jury's only problem is to determine the market value of the fee title of each tract of land which is shown on Exhibit V * * *" (R. 1671). He explained what was meant by "highest and best use", "there is nothing mysterious about it." (*Id.*) It was contended that the evidence would show that the highest and best use would be for each tract to be used in combination with the other tracts (R. 1671-1672). Mr. Janofsky concluded with the contention of Assem-

blies on the values of their various tracts (R. 1675-1677).

The next opening statement was by Mr. McLaurin on behalf of Salvation Army (R. 1677-1685). Mr. McLaurin expected to show that Tract No. A-101 (Building #1) was transferred from Mr. Carlstrom to the Salvation Army in April 1954 for \$750,000 and "That \$2,000,000 was by way of a charitable gift * * *" (R. 1680). This statement was made over the objection of the United States. The witnesses presented by Mr. McLaurin would give the investigations they made, the factors they considered, and the reasons they have for forming an opinion of fair market value (R. 1682). Some of the reasons were then noted (R. 1683-1684). Finally, he stated the fair market value he expected to prove (R. 1685).

Mr. Focht gave a brief opening statement for Mr. Carlstrom (R. 1686-1689). Mr. Focht noted that Mr. Carlstrom had transferred the properties to "selective charities", some by sale, some by "outright gift" and "some apparently was a combination of the two", so that he retained only Building #7 (Tract A-109).

Mr. Horton opened for Business Properties, which owned Tract No. A-100, improved by the drop hammer building (R. 1689-1692). This tract is not in the appeal.

The opening statement for the United States was by Mr. McPherson (R. 1692-1704). Mr. McPherson touched upon the tracts being valued without regard to ownership, that the property was to be valued as of June 16, 1955, in the condition it was in on May 1, 1953, comparable sales, the limitations of the parking

agreement, the problems of access to the plant, the fact that there must be a demand for the property for the highest and best use as well as mere adaptability, and the fair market value which the Government expected to show from all the tracts.

Landowners' evidence on fee taking

On the fee taking, the first witness for the appellants was John N. Sayer (R. 1704-1821). Mr. Sayer recounted the things he did to prepare himself to testify, some of which have not been printed (Tr. 4309-4322). Mr. Sayer gave the leases made between May 1, 1953, and June 16, 1955, that he considered (R. 1704-1737). The testimony on these leases was preserved for the jury on Exhibit #33 (R. 1718-1722, 2167). In explaining Exhibit 33, and the other exhibits listing comparable sales and leases, the court interpolated that it had required the experts for the Government and the landowners to exchange lists. On the compilation of these lists, Exhibit 25 (leases) and 57 (sales), the fact that the Government did not know of a sale or lease is indicated by a blank in the Government's exhibit number. The fact that the landowners did not know of a sale is indicated by a parenthesis around the landowners' exhibit number. The court explained this was purely a matter of mechanics from which no inference was to be drawn (R. 1712-1722, 2160, 2168).

There were extended arguments out of the presence of the jury on various subjects. When the jury returned, the court made these announcements to them. Relating to access roads, there was a dispute as to the

ownership of and the right to use a piece of ground 23 feet by 80 feet in the extension of Washington Street. Undoubtedly the matter would be eventually cleared up, but for the present there is some uncertainty about it (R. 1745-1749). Next, on access from Rosecrans Street from the North, there was introduced in evidence Exhibit V-1, which illustrated the width of that street. It was 12 and a fraction feet at its narrowest point (R. 1749-1753). The court ruled that leases between Mr. Carlstrom and Convair after January 1, 1951, with one exception, were not to be considered as comparables by the jury. Exhibit 25 was to be altered to indicate the excluded leases. "It is not your business why the court rules, but the court ruled that they were not free and open market transactions because of the compulsion testified to by Mr. Watts and testified to by Mr. Carlstrom" (R. 1754). Finally the court instructed that on the interplant road, after it left the vehicular overpass and went down to Washington Street, an easement 90 feet wide had been given by the United States for roadway purposes during its former ownership of which 35 feet was added to Pacific Coast Highway, and the remaining 55 feet was given to the City of San Diego for roadway purposes (R. 1755-1756).

The examination of Mr. Sayer continued with sales he had considered in connection with the fee valuation (R. 1757-1793). Before he started on these sales, there was introduced in evidence Exhibit 57, the composite of both the Government's and the landowners' comparable sales, and it was explained to the jury

(R. 1757-1765). The court instructed the jury not to be perturbed because there was a gap in the exhibit numbers. Some of the exhibits were in evidence before the court only. Eventually the Clerk would make up a list of exhibits before the jury so they would have all they were supposed to (R. 1758). Mr. Sayer testified generally on the sales, and previously on the leases that he did not consider them comparable to subject property on a unitized basis.

The court announced to the jury that Parcel 9-C of the term taking and Tracts A-110, 111, 112, 113, 114, 115, 116, 117, 118 and 119 of the fee taking, all pertaining to the railroad spur tracks, had been settled and withdrawn from the consideration of the jury (R. 1793-1794).

Mr. Sayer continued with an explanation of his capitalization of income study (R. 1795-1798). He also made a "cost analysis" of the subject property, or a "depreciated reproduction cost estimate" (R. 1798-1803). Mr. Sayer gave his opinion of the highest and best use of the subject property as of June 16, 1955. This was for industrial use, including manufacturing, assembling or related activities (R. 1803). The opinions of fair market value followed (R. 1805-1811). This opinion testimony was summarized for the jury on Exhibit 58 (R. 2170). Mr. Sayer concluded his direct examination with the reasons for his opinions (R. 1811-1813). These were the cost of reproduction new less depreciation as of the date of taking, the plottage value of the lands, the parking facilities available for 81 months after the date of valuation, and the analysis of the three basic ap-

proaches to value. On cross-examination Mr. Sayer testified that he considered all three basic approaches to valuation. He thought depreciated replacement cost analysis the most proper approach, the income approach being more proper for office buildings, apartments, etc. (R. 1820-1821). Depreciated reproduction cost should be given much more consideration than any other factor in his opinion (R. 1821). For the most part, the cross and redirect examination of Mr. Sayer has not been printed (Tr. 4721-4802). His opinions of fair market value on a segregated basis appear on Exhibit 59, however (R. 2171).

The next real estate expert for the appellants was Ewart Goodwin (R. 1822-1848). The testimony of Mr. Goodwin on his additional qualifications, the general recital of studies he had made to prepare himself, lists of specific sales of vacant lands,⁸ and his opinion that sales of improved properties were not comparable have been omitted from the printed record (Tr. 4856-4894). Mr. Goodwin then turned to the reasons for the values he ascribed to the subject property. He discussed the economic picture in San Diego in 1955 (R. 1822-1824). He found that 500,000 square feet of warehouse and manufacturing had been built or was planned in 1953, 1954 and 1955 (R. 1824). A well-informed person would be interested in the subject property because of its ideal location, because of what it would cost to build a similar facility elsewhere and because of the advantages of San Diego (R. 1825). Within San Diego, the plant locale had very good highway connections to all parts of

⁸ These sales are included in Exhibit 57, R. 2168.

the area (R. 1826-1827). The access to the plant itself from the neighboring streets and railroad was better than other industrial properties (R. 1827-1830). In forming his opinion of fair market value, the size of the buildings, the zoning of the property, original purpose of the buildings and their age were considered (R. 1830). There was "an evident demand for industrial property in San Diego" (R. 1831). It was generally known that there was a shortage of land for property that was zoned or improved for industry. Mr. Goodwin cited examples of expansion by other aircraft plants around the nation (R. 1831-1832). He noted the difficulty because of the Dispersal Program of getting a certificate of necessity for tax purposes to build new plants within 300 miles of the Pacific (R. 1833-1834). Mr. Goodwin discussed the reproduction cost new less depreciation, and concluded that any well-informed person would be very interested in a property he could buy for its reproduction cost less a fair depreciation (R. 1834-1838). Mr. Goodwin considered various factors relative to the reasonable probability of unitization (R. 1838-1839). The highest and best use of the property in his opinion was industrial and manufacturing, including the manufacture of small aircraft, aircraft parts, pleasure boat and other uses that might involve metal work (R. 1840). Mr. Goodwin then gave his opinion of fair market value (R. 1840-1848). This was summarized for the jury in Exhibit 60 (R. 2172). These values are also included in the summary in appellants' brief. Mr. Goodwin's testimony on cross and redirect exam-

ination has not been included in the printed record (Tr. 4926-5008). The testimony on the fair market value of the subject property on a non-unitized basis is summarized in Exhibit 61 (R. 2173).

The third real estate expert for the appellants was David F. Culver (R. 1849-1868). The studies he made, following the same general pattern as the other witnesses, has been omitted (Tr. 5009-5023). Mr. Culver gave his opinion on highest and best use: industrial, large assembly or subassembly of parts, heavy manufacturing (R. 1849). He then gave his opinion of fair market value on a unitized basis (R. 1850-1857). This was preserved for the jury on Exhibit 63 (R. 2175). Mr. Culver next gave the reasons for his opinion of fair market value. He considered the factors relating to unitization, that the tracts were tied together by common utility systems, that the owners held the buildings for investment purposes and that Salvation Army and Assemblies of God owned about 90% of the total area (R. 1858). The location was excellent, being on Highway 101. The property had unique plottage qualities. Nothing of the same size was available in the vicinity. The buildings were adaptable for the uses he ascribed (R. 1859). The trackage was important. It had unusual access from Rosecrans Street, Washington Boulevard and Highway 101. The parking rights were important (R. 1860-1862). Mr. Culver did not consider any of the sales directly comparable (R. 1862-1864). He found that improved industrial properties in the San Diego area had been selling at or above the depreciated replacement cost (R. 1865-1866). On cross examina-

tion, Mr. Culver stated that he used neither the reproduction, capitalization nor comparable sales method directly to determine fair market value, but he used them to check his opinions (R. 1867-1869). Most of the cross-examination has not been included in the printed record (Tr. 5048-5060). His testimony on the fee value on a segregated basis was summarized for the jury in Exhibit 64 (R. 2176).

The final witness for the appellants was Charles B. Shattuck (R. 1869-1881, 1889-1907, 1922-1925). Mr. Shattuck initially gave his opinion of fair market value (R. 1869-1876). These figures are contained on Exhibit 65 (R. 2177). They are also included in the summary appearing in the appendix of appellants' brief. Mr. Shattuck then continued with the general line of testimony, the factors he considered, the reasons for his opinion, etc., as the previous experts. Most of direct, the cross and redirect have not been printed (Tr. 5105-5152, 5272-5366). There was one respect in which Mr. Shattuck's testimony differed from the others. Following the appellants' general line, Mr. Shattuck had testified why the sales on Exhibit 57 and leases on Exhibit 25 were considered non-comparable and inconclusive of fair market value (R. 1876-1879). He then explained how the summation method, or reproduction new less depreciation, was used in determining fair market value (1879-1881). A bit later, there was introduced a series of exhibits entitled "A Capital Value Estimate, Stabilized Income and Expense". One exhibit was made for all tracts as a unit and for each tract individually (R. 2179-2188). Mr. Shattuck explained these exhibits item by item (R. 1889-

1901). One of these items was a reserve for repair and maintenance. “* * * I estimate that the reserve or expense in that regard is going to be equivalent to the building cost new multiplied by .0056. That’s fifty-six hundredths of one percent of the cost new of the building annually, set aside for repair and maintenance, which amounts to \$86,250 a year” (R. 1893–1894). Mr. Shattuck concluded this discussion with a check of the capitalization rates which he used against those prevalent in the sales and leases appearing on Exhibits 25, 33 and 57 (R. 1901–1905). The “final upshot of all this” was that the reproduction costs approach will be given greater weight in appraisals of industrial property with the income approach next and the comparable sales approach being “of no help in the absence of strictly comparable property * * *” (R. 1906–1907).

On the basis of this testimony, the United States moved for a mistrial (R. 1907–1917). The testimony was violative of the court’s order that the reproduction cost of the building could not be introduced in evidence. All the jury would have to do to calculate this witness’ estimate of reproduction cost new would be to divide .0056 into \$86,250. The motion for mistrial was denied (R. 1913). The court did, however, instruct the jury that it was to disregard any reference to the percentage figure (R. 1917–1922). The court instructed the jury that reproduction new less depreciation was not fair market value, although the experts could use that method as a check against their opinion of fair market value. The fee valuation testimony on a segregated basis given by Mr. Shattuck on

cross-examination is summarized in Exhibit 100 (Tr. 5302-5305, R. 2189).

Earlier, during Mr. Shattuck's direct testimony, the court instructed the jury that it was to disregard certain leases between Mr. Carlstrom and Convair insofar as the amount of rentals paid for those leases was concerned (R. 1881-1883). The jury was given a new Exhibit 25-S (for substituted) which eliminated from the old Exhibit 25 all those leases which the court had stricken (R. 1887). The stricken leases could be considered by the jury, however, insofar as the area of such leases and the terms (as to time) of the leases affected the possibility of the property being unitized (R. 1883-1886).

At this point of the trial the jury was allowed, over the objection of the Government because of changes in the property and its use, to visit the plant in the company of the court and counsel for both parties. An account of what transpired is printed in the record (R. 1925-1936).

The next witness was Mr. Bruce Stallard, who testified as a real estate expert for the defendant Business Properties, Inc., former owner of Tract A-100, the drop hammer building (R. 1937-1943). Mr. Stallard gave his opinion of the highest and best use on a unitized basis as part of Plant No. 2, his fair market value and reasons. The opinion of value was preserved for the jury on Exhibit 103, which has not been printed because no appeal has been taken by Business Properties, Inc. (R. 1939). Value testimony has been summarized in the appellants' brief on Tract A-100.

The court allowed the jury to consider the original sale of the plant from War Assets to Mr. Carlstrom, and the sale of Building 8 by Mr. Carlstrom in 1947 and 1948 (R. 1943-1944). These sales were added to the list of sales as Exhibit 57-1 (R. 2169). The court cautioned the jury on the effect that the element of time had on comparability at the time this exhibit was introduced.

Government's case—fee taking

The first real estate expert for the Government on the fee taking was John Cotton (R. 1944-2011). On direct examination Mr. Cotton gave the steps he took in making his determination of highest and best use and fair market value of the tracts. Generally, he ascertained the ownership, found the ingress and egress available to the tracts, and rechecked the economic data for San Diego (R. 1944-1947). Mr. Cotton discussed the leases appearing on Exhibit 33 (R. 1949-1955). He discussed the sales appearing on Exhibits 57 and 57-1 (R. 1955-1976). The comparability of the various sales and leases to the subject property was pointed out in this discussion. Mr. Cotton also made a market trend analysis of properties which had been sold more than once between 1946 and 1955. This was to determine the trend and the market increase between the first and later sales. These sales and resales were discussed individually (R. 1977-1994). This information was summarized for the jury on Exhibit AM (R. 2194). Mr. Cotton also made a study of the value of the equipment in Building 5, the utility building, Parcel A-121 (R.

1995). His opinion of fair market value of each tract followed (R. 1996–1999). This information was summarized for the jury on Exhibit AN, and appears in the resume in appellants' brief (R. 2195). Mr. Cotton next gave his reasons and factors combined for his values. He considered the separate ownership of the several parcels (R. 2000–2002). He found a resistance in the market to the subject properties (R. 2005–2006). The size of plants in the San Diego area was analyzed, the use of single purpose properties for purposes other than their original use, the reasonable probability of unitization of the subject tracts, and the temporary nature of the parking rights were also considered (R. 2006–2008). Mr. Cotton gave his opinion of highest and best use, which was generally warehousing and light manufacturing (R. 2008–2010). The cross-examination has not been printed, nor has the redirect or recross (Tr. 5658–5820).

The next expert for the Government was Fred B. Mitchell (R. 2011–2034). The studies Mr. Mitchell made preparatory to making his appraisals have been omitted from the printed record (Tr. 5821–5852). Mr. Mitchell expressed the opinion that most of the tracts would have a highest and best use for light industrial uses, storage or warehousing and some would have commercial value (R. 2011–2015). The opinion of fair market value followed. The recapitulation of this testimony was presented to the jury on Exhibit AY (R. 2196). It is also included in the summary in appellants' brief.

The direct examination was concluded with the combined reasons and factors for Mr. Mitchell's opinion. His conclusions were predicated on the economic conditions on the date of appraisal, the types of the buildings, their relation to each other, the ownership of the various tracts, the trend toward larger parcels of land with excess land for expansion, the lack of a market for a large but incomplete plant of this size by a single user, the average size of businesses in San Diego, the supply and demand element, the single purpose construction of the subject property, the nature of buildings that had been constructed in the neighborhood recently, and economic conditions in San Diego (R. 2018-2128). Mr. Mitchell concluded with an explanation of how he found the comparable leases and sales helpful (R. 2028-2031). Most of the cross and redirect examination of Mr. Mitchell has not been printed (Tr. 5875-6027).

The final real estate expert for the Government was Roy C. Seeley (R. 2034-2050). The steps he took to prepare himself have not been printed (Tr. 6030-6034). Mr. Seeley then expressed the principal factors and reasons for his opinions. These included the effect of the end of the Korean War, sales of industrial property in San Diego since 1948, the traffic situation relative to the subject property, and the supply and demand for industrial property in the San Diego area (R. 2034-2037). Mr. Seeley was unable to find that any demand for the subject properties existed (R. 2037). There was a possibility that the interplant road which went over the vehicular overpass and south to Washington Street could be reduced

in width from 55 to 15 feet by the City of San Diego (R. 2038). The parking agreement was for a limited term (R. 2038-2039). There had been a preference shown in the San Diego area for other properties rather than the subject tracts (R. 2039). The buildings were in need of rehabilitation. The size, shape and type of construction of the nine buildings which were specially located and designed for a special purpose and their interrelation were considered. The limited access to the tracts from Rosecrans and to Washington Street was considered. Mr. Seeley considered the purchase price of the entire area of \$1,050,000 and the purchase price of \$108,900 paid for Tract A-100 in 1948 (R. 2041). The unsuccessful efforts of Mr. Carlstrom to sell or lease portions of the plant were considered. The parking space in relation to the size of the buildings was inadequate and poorly located. The industrial dispersal plan was still in effect (R. 2041-2042). Mr. Seeley, after giving the assumptions on which he based highest and best use and fair market value, stated the highest and best use for each tract. This he found to be commercial or light industrial uses (R. 2042-2045). Mr. Seeley concluded his testimony on direct examination with fair market value for each tract (R. 2046-2048). This testimony was preserved for the jury on Exhibit BA, and is in the summary in the appendix of appellants' brief (R. 2197). The cross-examination of Mr. Seeley has been omitted from the printed record (Tr. 6352-6429).

The only witness on rebuttal was Mr. Howard Turrentine, an attorney for the lessee of Building 8, the drop hammer building (Tr. 6458-6465). This is not

included in the printed record as it was merely to show that there had been negotiations by Convair in 1951 and 1952 to obtain a lease on that building from the lessee and lessor.

Closing arguments to the jury were given by Mr. Janofsky for Assemblies of God and Children's Aid Foundation (Tr. 6728-6790), by Mr. Focht for Mr. Carlstrom (Tr. 6799-6811, 6846-6865), by Mr. McLaurin for Salvation Army and Mr. Carlstrom (Tr. 6867-6902, 6909-6933), by Mr. Horton for Business Properties, Inc. (Tr. 6933-6956), by Mr. Minton for the Government (Tr. 6993-7057), and by Mr. McPherson for the Government (Tr. 7057-7109, 7117-7139). Replies to the Government's closing argument were made by Mr. McLaurin (Tr. 7140-7167), Mr. Focht (Tr. 7167-7180, 7184-7196), Mr. Horton (Tr. 7196-7203) and Mr. Janofsky (Tr. 7203-7244). These arguments have been omitted from the printed record.

Instructions of the court

Following closing argument the court took some two hours and twenty minutes to read a comprehensive charge to the jury (R. 2050-2131). Without attempting to paraphrase completely the court's charge, a summary is given of the main points. The court determines the law and the jury the facts (R. 2051). The instructions must be considered as a whole. The jury is to determine, as to the applicable parcels of the term and option taking shown on Exhibit A and the applicable tracts in the fee taking shown on Exhibit V, the fair market value as of the date of taking (R. 2051-2052). The United States, profit and

nonprofit corporations are each entitled to the same fair trial (R. 2052). The court discussed inferences and presumptions (R. 2053). Statements and arguments of counsel are not evidence unless made as an admission or stipulation (R. 2054-2055). The court instructed what the evidence consisted of (R. 2055). Credibility, inconsistencies and contradictory evidence are discussed (R. 2055-2057). The view of the premises is evidence, although the activities there could not be considered and the condition of the buildings would be established from the other evidence in the case as of May 1, 1953 (R. 2057). The testimony of a single witness is sufficient to establish the proof of a fact if he is believed even though a number of other witnesses have testified to the contrary (R. 2057-2058). The exhibits reflecting the testimony of various experts are not direct evidence, but only summaries of the testimony heard, and are to be used only for refreshing the jury's recollection (R. 2058-2059). An expert witness' opinion is worth no more than the reasons upon which it is based. Value of expert opinion is then discussed (R. 2059-2060). In determining the market and rental values, the jury is not bound to accept the opinion of any witness but must determine such fact for itself. Burden of proof, preponderance of the evidence and quotient verdicts are discussed (R. 2060-2062). The United States has the right to take property, but such right is subject to payment of just compensation (R. 2062-2064). The court defined fair market value for the term taking, for the option to renew, and the fee taking (R. 2064-2068). All factors shown to affect fair market value

must be considered. However, factors that depend on events or combinations of events which, while within the realm of possibility, are not reasonably probable should be excluded (R. 2068). The jury was instructed on the nature of the estate taken by the term taking and the option (R. 2068-2069). The court specified the issues of fact to be determined by the jury (R. 2070-2072). The court has ruled that Parcel 5, containing Building 4, an office building, has easements of necessity to the inplant road, the pedestrian overpass, and to the service and frontage road. There are no easements of necessity affecting Parcels 6 and 7, Buildings 2 and 3, and ingress and egress is by means of 25-foot strips shown in Exhibit A. If the owners of the buildings affected by the Easement Plans and Agreements, Exhibits 6-M, 6-O, 6-Q and 6-S, were required to sever the service facilities for Parcels 6 and 7, there would be an easement of necessity to reinstall and connect service facilities. This instruction was illustrated by the court on Exhibit A (R. 2072-2074).

The right of the plaintiff to extend the term taken from year to year until 1958 at the same rental rate is a property right in the nature of an option which must be separately evaluated (R. 2074). There is no burden on the landowners to show a particular person or corporation ready, willing and able to purchase or lease the property (R. 2075). Nor, on the other hand, does the fact that the property was available and adaptable for various uses on the dates of taking mean that there was a market or prospective market on such dates (R. 2075). Population increases, busi-

ness activity, prospects of new markets shown by growth of the community and trends in the real estate market are all elements to be generally taken into account in determining value (R. 2075-2076).

Fair market value was defined and discussed for the jury (R. 2076-2077). In arriving at fair market value, neither the necessity of the United States to have these properties nor the wants and desires of the landowners are material (R. 2078). Fair market value is to be determined by considering any and all uses to which the property is adaptable, including highest and best use. The highest and best uses are those which the credible evidence shows were probable in the reasonably near future (R. 2078-2079). If any of the witnesses have based their opinions upon assumed or potential uses not shown to be reasonably probable, their testimony should be disregarded (R. 2079). Uses made of the property after the date of taking cannot be considered (R. 2079-2080). The necessities of the plaintiff for the property are not to be considered. However, this does not mean that the jury should exclude a similar use, including uses made of the property before May 1, 1953, if the jury believed that private individuals or corporations would also desire to purchase or lease the property for similar purposes (R. 2080). If because of government activity in and around San Diego, represented by the Navy base, the air station and private plants doing government work, there has been a general increase in rental and fee values throughout the area, then and to that extent the verdict may reflect the general market thus created and the Government may not complain.

But the need of the Government, if such the jury finds, for the property for military purposes after May 1, 1953, or enhancement in the value of the property by such need, will not be considered (R. 2081).

Value to the defendants for speculative or merely possible uses is not to be considered, nor what the property may be worth to the plaintiff. The court discussed "reasonable time" for making a rental or sale of the property (R. 2081-2082). In determining value, the same considerations are to be regarded as in a transaction between private parties (R. 2082). The willing buyer or user does not have to be a resident of this community. He might come from anywhere or have business activities anywhere. What the law demands is that the property be appraised on the basis of the market in the community in which it is located (R. 2083-2084). Fair market value does not mean what the property would bring under forced, distressed or duressed circumstances (R. 2084).

Market value must be for the land and improvements as a whole (R. 2084-2085). The court pointed out easements appurtenant to the various parcels and tracts, and instructed that the jury should include as part of the value any value which pertains to the right to use these appurtenant easements (R. 2085-2086). The court instructed how the petitions filed before the Board of Equalization were to be used (R. 2086-2088). A tag was placed on each exhibit filed in connection with these petitions to refresh the jury's recollection as to the limited consideration that may be given them (R. 2087).

The parcel and tracts containing the railroad spur tracks have been removed from the jury's consideration. But in arriving at the value of the remaining parcels and tracts which had the railroad spur available to them, they are to be valued just as though the railroad spur had not been removed from the jury's consideration (R. 2088).

The weight to be given the sales to Carlstrom and Gregory Electric in 1947 and 1948 is solely for the jury to determine (R. 2089). The leases of the subject property were discussed (R. 2089-2090). The weight to be given the leases remaining in evidence is for the jury's sole consideration. The parking rights must be considered in evaluating the various parcels and tracts (R. 2090-2092). Assessed value of the property for tax purposes must not be regarded as market value (R. 2093).

Bona fide sales and leases of comparable properties, if such are found, made within a reasonable time before the date of valuation, are the highest and best evidence of market value (R. 2093-2096). Comparability is a question of fact for the jury. If there are no comparable sales and leases, market value must be estimated (R. 2096). The determination is to be made in the light of all facts affecting market value. The witnesses have referred to three basic approaches to value, capitalization of income, reproduction cost new less depreciation of the improvements with land value, and comparable sales (R. 2097). In weighing the validity of their opinions, the jury may consider the weight given by them to each of these approaches in the light of all the facts in the case, and give to each

approach the weight to which the jury felt it was entitled (R. 2097). Reproduction cost new, less depreciation, plus value of the land, is not fair market value, but may be considered by an expert witness in forming his ultimate opinion as a check (R. 2098). Capitalization of income is a proper approach to market value, although it is not the sole approach.

The court then instructed on unitization (R. 2098-2104). The issue is whether unitization is reasonably probable (R. 2098). The contentions of the parties are outlined (R. 2098-2099). If the jury finds there is a reasonable probability of unitization, that should be considered not only for any bearing on highest and best use but also for its bearing on fair market value (R. 2100). The jury must differentiate between the reasonable probability of unitization on the leasehold and the fee (R. 2100-2101). The possibility of unitization must be enough to affect market value (R. 2102). The fact that one having the power of eminent domain may unite the property must be excluded. Whether there is a reasonable probability of unitization is not to be affected by the fact that the verdict is to be returned by parcels. The fact that the railroad spur has been removed from the jury's consideration does not remove it on the question of unitization (R. 2103). The mere fact that the attorneys for landowners have or have not cooperated in presenting evidence does not affect the question of unitization (R. 2103).

The relationship of the owners, the purposes for which they held the property, the character of the property, its availability and adaptability, and avail-

ability of other similar property could be considered (R. 2103-2104). The jury must not add anything to the award because the property was taken some time ago, nor must the amount the Government deposited or the landowners withdrew affect the verdict (R. 2104-2106). Court costs, attorneys' fees, and related costs are not to be considered by the jury (R. 2106-2107).

The court cautioned against chance methods of arriving at a verdict (R. 2107-2108). In admitting evidence to which an objection has been made the court does not pass on the credibility of such evidence (R. 2108). Conjecture must not be made about excluded evidence. The jury may disregard comments by the judge on the evidence in the case (R. 2109). The same is true of questions the judge asks a witness (R. 2110). The court told the jury how it should approach its deliberations, not to start out with emphatic opinions, etc. (R. 2110-2112). The court concluded with an explanation of the form of the verdict (R. 2112-2116).

The jury was advised it could submit questions in writing if it desired any additional information (R. 2122). The jury retired on May 13, 1957. In answer to an inquiry on the factors to be considered in unitization the court on May 14, 1957, gave further instructions (R. 2124-2131). On May 24, 1957, the jury requested to have the court's instructions repeated, and this was done (Tr. 7392-7465). Only portions of the repeated instructions are printed (R. 2133-2137). On May 27, 1957, the jury returned its verdict as appears at pages 2141-2142 of the

record. The answers of the jury to the special interrogatories were read into the record also (R. 2138-2140).

Phases of the case heard out of the presence of the jury

To acquaint this Court in a purely topical form with the portions of the trial of this case with which the jury was not concerned, the following portions of the transcript are noted: The process of selecting the jury is reported (Tr. 30-306). The issue of title to the railroad spur, Parcel 9-C and Tracts A-110 to A-119, was tried to the court without the jury (Tr. 313-545). Further chambers discussions of the railroad spur are found at pages 636-643, 654-660, 720-741, 4269-4292, and 4704-4710 of the transcript. The admissibility and use of evidence of reproduction cost new less depreciation were argued at length (Tr. 1380-1384, 1655-1719, 1729-1754, 1903-1904, 4804-4847). The effect of the various easements to and from the individual buildings, and whether grantees of Mr. Carlstrom were entitled to easements of necessity, were at issue in chambers (Tr. 1754-1903, 2475-2483, 3377-3382, 3841-3880, 4053-4084). What constituted comparable sales, especially the "part sale-part gift" transactions between Mr. Carlstrom and the charitable organizations, was debated extensively before the court alone (Tr. 1994-2013, 4206-4247, 4367-4375, 4426-4538, 4573-4577, 4610-4619, 5538-5546, 5586-5602). The admissibility of the Carlstrom-Convair leases was debated, whether they were free and open market transactions (Tr. 2150-2269, 3115-3125). There was argument about the admissibility of ap-

praisals made by the experts on other occasions as a challenge to credibility (Tr. 3752-3762, 3772-3780, 6331-6351, 6429-6455, 6573-6584, 6629-6654, 6670-6722). Whether the jury should view the premises was argued out of its presence (Tr. 4170-4191). The legal issues concerning access to the plant from the surrounding streets were discussed without the jury (Tr. 4377-4423, 4538-4573, 4577-4609). Lastly, considerable portions of this transcript are devoted to argument about instructions (Tr. 5212-5250, 5399-5409, 5741-5788, 6057-6327, 6472-6522, 6535-6573, 6584-6589, 7247-7259).

SUMMARY OF ARGUMENT

I

THE CONSOLIDATION OF THE TERM AND FEE PHASES OF THIS CASE FOR A SINGLE TRIAL WAS A PROPER EXERCISE OF DISCRETION BY THE TRIAL COURT

This case involves the taking of 10 industrial type buildings, surrounding lands and supporting facilities which had been built as part of a single industrial plant. One of the main contentions of appellants was that the property should be valued as one unitized plant. Had each tract or parcel containing isolated buildings been tried separately it would not have been fair to the landowners, nor would splitting the term from the fee taking have been fair to the United States. In neither case would the jury have received the whole picture.

There is no dispute as to the applicable law. The trial judge has broad discretion as to the method which will accomplish the best result, and the appel-

late court will not substitute its judgment merely because that seems a better choice. The handling of the case by the district court, far from being an abuse of discretion, showed great competence, skill and ability. The jury received expert guidance, and had practically all the determinative factors summarized on exhibits which it had before it in the jury room. Also, the jury stayed out long enough to allow it to consider properly all the evidence.

The fact that the award for one tiny tract of vacant land was higher than any expert opinion is insignificant. According to appellants' own witness this tract was only $\frac{1}{10}$ th of one percent of the total value involved. Other than this one minor matter, the jury had a perfect record for all the awards and interrogatories.

Comparisons of this case to *Gwathmey v. United States*, 215 F. 2d 148 (C.A. 5, 1954), on the basis of number of pages of transcript, number of days' trial and pre-trial, total dollars involved, etc., are superficial. The *Gwathmey* case is readily distinguishable because there were 238 separate tracts which had no relation to each other, for the most part, whether of ownership or use. Further, the court in *Gwathmey* indicated as many as 50 parcels could be tried fairly in one proceeding. There was also a serious lack of due process because counsel was not given a fair opportunity to cross-examine. Appellants do not claim any violation of due process on cross-examination here.

In final analysis, appellants' argument that the case was too complex is based simply on length of the

record. As the rather full summary of the case presented to the jury in our statement shows, the case was presented to the jury in an easily comprehensible manner. Most of the length is accounted for by pure repetition and extensive hearings without the jury.

Appellants would require a new trial to divide the case into two parts, but fail to show how this would simplify it any further for the separate juries. There is no warrant for imposing a procedure so wasteful of the court's and jury's time.

II

THE COURT WAS CORRECT IN ITS MISCELLANEOUS RULINGS ON EVIDENCE OF WHICH APPELLANTS COMPLAIN

A. Evidence of the cost of rehabilitating the property for its highest and best use is a properly admissible factor to be considered by the jury. Mr. Hallock testified for the Government on the condition of the property as of the date of possession. In enumerating the repairs required, Mr. Hallock used photographs to illustrate specific defects. The jury was adequately instructed as to the nature of the photographs, and what they represented, and authenticity was not denied. Under the circumstances, there is no doubt that photographs are admissible. Whether a particular photograph will be admitted lies within the discretion of the trial judge.

The amount that it would be necessary to expend to make a property usable for its highest and best use is something that an intelligent buyer would be vitally concerned with, and is admissible. *Kinter v. United*

States, 156 F. 2d 5 (C.A. 3, 1946), is not germane, because the court there excluded cost of past repairs made on the property over the years, not the current cost of rehabilitation.

B. The district court ruled correctly and within the scope of its judicial discretion by eliminating from the cross-examination of Mr. Hallock repetitious and remote questions that threatened to prolong the trial greatly. The specific ruling complained of excluded further questioning on whether any repairs had been done on the sewer system between the date of valuation and time of the trial. The purpose was to test the credibility of Hallock's opinion that certain repairs were necessary. The question of whether these repairs were necessary had already been dealt with at length, and the substance of Hallock's answer was that "* * * maintenance can be deferred and deferred and deferred until a building falls down, if you want to." The line of questioning came after Mr. Hallock had been cross-examined for a full day and a half wherein rehabilitation had been covered extensively.

When dealing with evidence, such as condition of the property, relating directly to value, the district court had wide discretion. It was certainly no abuse of that discretion to limit remote and repetitious cross-examination. There are a few instances where facts occurring after the date of taking may be shown to prove or disprove the accuracy of an opinion formed at the date of taking. Had appellants merely wanted to know whether a subsequent inspection verified Mr. Hallock's opinion that repairs were neces-

sary, it might have been admissible, but a general recital of all repairs made subsequent to the date of taking is far beyond any of the decided cases. The ruling of the trial court is in accord with the general rule that valuation of land in a condemnation proceeding must be determined as of the time of taking.

C. Reproduction costs are not a reliable guide to fair market value and were properly rejected as direct evidence in this case where other evidence of a more trustworthy nature was available. The district court ruled that it would allow the experts to state, in general terms, that one of the factors they took into account in arriving at their opinions of fair market value was reproduction cost less depreciation. But the court would not allow the experts to go into an itemized accounting of the reproduction cost.

The measure of just compensation in a condemnation case is fair market value, and the best evidence of fair market value is comparable sales. In real property there are rarely enough transactions involving identical property to give an indisputable market price such as exists for fungibles. But this simply calls for weighing the incomparable elements of similar sales with the comparable elements and the basic objective remains the same.

There were over 50 recent sales of commercial and industrial property in the vicinity of Convair Plant #2, although, admittedly, few of them were as large in size. The jury also had before it the testimony of the experts on capitalization of income and their opinions of fair market value. In these circumstances it was not error to exclude an extended discussion on

the collateral issue of the cost of reproducing the buildings. Such evidence tends to confuse and mislead the jury and divert the attention from the actual value, i.e., what a willing buyer would pay a willing seller on the date of taking.

Reproduction cost has been almost universally discussed for its infirmities and unreliability as a guide to market value. Even those courts which allow evidence of reproduction cost have been careful to limit the circumstances in which it can be used and the purposes of its use. By contrast none of the cases relying on comparable sales feel it necessary to explain why other approaches to value are not used, or carefully limit its scope.

Reproduction cost is also unreliable as a guide to market value because, when used as the appellants wanted to use it, it amounts to an appraisal of the buildings separate from the land.

D. Government needs for a particular type of property cannot be considered in determining just compensation. To be clearly understood the introduction and subsequent striking of Convair leases must be viewed in correct time sequence. The district court initially ruled that leases between Convair and Mr. Carlstrom could be referred to just as any other comparable leases. These were discussed by appellants' experts. The court instructed that these leases could be considered to the extent they reflect a general increase in San Diego rental prices, but any increment due to the necessity of the Government for this particular facility could not be considered. At the outset of the Government's case on the term taking, it pre-

sented Mr. Watts, a vice president and general counsel of Convair, showing the necessity of Convair for this facility due to its contracts for military aircraft, and the reluctance of Mr. Carlstrom to make any leases to them. On motion of the United States the court withdrew the leases in question from the jury's consideration. At the request of appellants, however, the court modified its position to leave in evidence the terms of the leases as to area, location, etc., because of the unitization question. The appellants cannot complain, therefore, if parts of these leases remained in evidence. As for the Watts testimony on aircraft manufacturing contracts, that was presented as part of the rebuttal to appellants' contentions that the Convair leases were fair market transactions. Such rebuttal was of no weight when the court rejected the lease prices, and would probably have been removed had appellants' motion been made *after the Convair lease prices had been stricken*.

In striking the lease prices the court was following the mandate of the Supreme Court in *United States v. Cors*, 337 U.S. 325, 333-334 (1949), where it was held the Government cannot be required to pay an enhanced price for a type of property which its demand alone has created. This follows the general rule that the jury cannot consider the Government's needs for a specific property. Special value to the condemnor has long been excluded as an element of market value. The amounts paid by a condemnor for the same or other property are not even evidence of market value.

It is also clear from the testimony that, regardless of its formal legal relationship, the United States was in fact paying almost all the rentals. Under these conditions the courts treat the government contractor as the agent of the United States to see that substantial justice is done.

E. The district court was correct in ruling that the previous sale of the same property and Carlstrom's admissions against interest in a tax proceeding were admissible and in excluding evidence of fair market rental value 14 months after the date of taking. The courts have frequently held prior sales of the same property admissible, and whether such sale is too remote is a matter within the discretion of the trial judge. The district court was equally correct in admitting petitions which Carlstrom made in an effort to have his tax assessments lowered. While an actual assessment made by a public officer is not admissible, a tax return or statement of value made by the owner is admissible as an admission against interest.

Finally, the district court was correct to reject proffered evidence of the value of the term taking 14 months after the date of taking. The United States when it took the first 14-month term took an option to renew. Obviously, this was an option to renew at the same price; otherwise there was no purpose in taking an option. The United States had the power to condemn all the additional terms it wanted without paying for the option.

ARGUMENT

I

THE CONSOLIDATION OF THE TERM AND FEE PHASES OF THIS CASE FOR A SINGLE TRIAL WAS A PROPER EXERCISE OF DISCRETION BY THE TRIAL COURT

The trial court had before it in this case a taking of 10 industrial type buildings with surrounding lands and supporting facilities. These buildings were part of a plant that had been built to operate as a unit. Indeed, appellants contended vigorously at the trial that the highest and best use of the buildings and facilities was on a unitized basis, and that they should be valued on that theory. It is believed a fair surmise that, had the United States insisted on trying each parcel or tract to a separate jury, the appellants would have protested vehemently. Admittedly, the jury trying a single isolated building could not have received a true picture showing its value in the context of a part of the whole. Similarly, if different juries had tried the term taking or the fee taking separately, as appellants urge, they would, in the aggregate, have spent more time and cost more money to achieve a less fair result because they would not have the over-all picture.

There is no dispute on the applicable law, nor was there in the trial court. The two federal cases which deal with the question of separate trials for the taking of related property announce essentially the same rule. "Because of the complex and variable nature of such factors in modern conditions, the law very wisely allows the trial judge a broad discretion as to

methods which shall be used in accomplishing the best results, and an appellate court should not insist upon substituting its own judgment by selecting something else, merely for the reason it seems a better choice." *Gwathmey v. United States*, 215 F. 2d 148, 153 (C.A. 5, 1954). "A condemnation proceeding brought against owners of several tracts of land is one suit. The several answers may in the discretion of the court be given separate trials. Discretion in this case was exercised by impaneling one jury for all * * *, and then giving to these appellants in effect a separate trial before that jury, followed by a separate verdict on their land, and a separate judgment.⁹ We find no such confusion or prejudice to have resulted as would show an abuse of discretion." *Atlantic Coast Line R. Co. v. United States*, 132 F. 2d 959, 962 (C.A. 5, 1943). The appellants were in agreement in the court below that the matter of a separate trial was within the discretion of the court (R. 307, 323). Apparently, appellants are still of the same view since they attack the action of the district court as an "abuse of its discretion" (Br. 16).

The handling of this case by the district court, far from being an abuse of discretion, showed great competence, skill and ability. The jury was given more assistance than a jury normally receives even in long and complicated cases. From time to time during the trial, the jury was told the purpose of the introduc-

⁹ There was apparently some question in the trial court whether the verdicts for the over 200 parcels were returned severally and at different times. Mr. McPherson made a further inquiry to find that a single verdict had been returned (R. 355-356).

tion of particular classes of evidence, the law applicable thereto and the facts it would have to decide. When it retired to the jury room to deliberate it had before it, summarized in exhibits, practically all of the really determinative factors in the case. It had all comparable sales and leases in Exhibits 25-S, 33, 57 and 57-1 (R. 2160, 2167, 2168, 2169). All of the pertinent data about these sales and leases were compiled in easily comprehensible tabular form, size, location, description of improvements, dates, terms, rents, rents averaged per square foot per month, and sales price averaged per square foot of building and open space. The jury had before it the summary of each expert's testimony on both the fee and the term takings (R. 2159, 2161, 2162, 2163, 2164, 2165, 2170, 2171, 2172, 2173, 2175, 2176, 2177, 2189, 2191, 2192, 2193, 2195, 2196, 2197). Again, all these exhibits illustrating the expert's opinion were clearly tabulated by parcel or tract to explain the basis of the opinion.

The capitalization of income approach was summarized for the jury (R. 2179-2188). The income was capitalized for the property as a whole, and each major building of the fee taking was listed separately on an exhibit illustrating how to arrive at fair market value by capitalization of income. The trend of prices of real estate in the San Diego area was also illustrated for the jury by an exhibit (R. 2194. There were other exhibits, maps, photographs, and mathematical illustrations, to refresh the jury's recollection of this property with which it had become intimately familiar through the several months of testimony. The jury had seen the property. It heard detailed

descriptions of its condition. It had heard the preparations, the factors, the reasons, the highest and best uses, and the fair market values repeated 14 times with variations, so that even a juror learning by pure rote should have almost been qualified to take the stand and testify as an expert himself.

What is perhaps most gratifying is that the jury stayed out for over two weeks, giving itself plenty of time to deliberate and consider the evidence and exhibits carefully. One could have been very suspicious had it returned with its verdict in a mere two or three days that it had not considered all the evidence. But the awards and the length of time it spent in arriving at them indicate that all evidence was reviewed and properly weighed.

The appellants (Br. 30-31) make much of the fact that the award for one tiny tract of vacant land was higher than the opinion of any expert. Viewed objectively, throughout the trial Tract A-106 was given the minutia treatment it deserved. That the appellants considered it insignificant is indicated by the fact that their highest testimony for the tract was \$10,000, given by Mr. Culver out of a total valuation opinion in excess of \$10,000,000 (R. 2175). In other words, they thought it was $\frac{1}{10}$ th of 1 percent of the total. Small wonder in these circumstances the jury probably did not spend a great deal of time on this tract, and in the process awarded more than the expert testimony would indicate was proper. Other than this one minor matter, the jury has a perfect record for all the awards and interrogatories.

The appellants make many superficial comparisons between this case and the *Gwathmey* case, *supra*, e.g., number of pages in the transcript, number of days in pre-trial and jury deliberation, and total dollars involved in the award (Br. 24). These things may be of some importance, but it can hardly be a *prima facie* case that the jury was confused because the trial lasted 17 weeks or the awards totaled in the millions of dollars. It is also somewhat misleading to state of the *Gwathmey* case that the jury awarded compensation for "the 50 separate tracts owned by the group appellants" (Br. 24). In fact, the jury returned verdicts on 238 separate tracts. 215 F. 2d 148, 156. In *Gwathmey* the tracts were combined only because they were being condemned for a single governmental purpose and separate trials individually or in small groups was a possible alternative. Appellants would be the first to reject such a trial of this property, which they claim may be best used as a single, unified, industrial plant. Further, the court said in *Gwathmey* that, of the 50 tracts which were in the appeal, "It may well be that upon remand, having been reduced considerably by the failure of many landowners to appeal, this case can be fairly tried in one proceeding before one jury." 215 F. 2d 148, 158. The jury in the *Gwathmey* case apparently had nothing but its own notes in the jury room, while here the jury had exhibits illustrating practically all the essential information in the case. 215 F. 2d 148, 153-154, 156. In the *Gwathmey* case, lack of due process was shown because counsel had been misinformed about when evidence on their particular tracts would be

presented, and because the cross-examination came so long after the direct evidence as to be ineffective. 215 F. 2d 148, 154. Appellants here claim no such procedural error.¹⁰ Plainly, the differences make this case and the *Gwathmey* case readily distinguishable and fortify the conclusion that the district court here acted with fairness, prudence and without abuse of discretion in any manner.

In final analysis, appellants' argument, that the case was so complex it was impossible for the jury to understand it, is based simply on the length of the record. Even a simple case may be garbled so badly in presentation as to be unintelligible. On the other hand, the most complex cases can ultimately be resolved to understandable issues. We do not deny that the case would require considerable study to understand, nor that many subsidiary issues of fact and law were raised in these proceedings. But to determine whether, when the jury received the court's instructions and retired, it was reasonably probable that as an intelligent group it could understand the issues, one must understand the record. We do not, of course, expect this Court to read the entire original transcript, nor even the condensed printed record. To assist this Court, we have set forth a rather full "Statement" (*supra*, pp. 8-73), deleting to the best of our ability mere repetitions, of the case as it was

¹⁰ Although the district court did not allow appellants to pursue certain lines of inquiry on cross-examination because it was beyond the scope of the direct and involved matters occurring after the date of taking, they were given every opportunity to make a timely cross-examination and were fully advised as to when the evidence was to be presented.

presented to the jury. When the Court reads this summary it will be easy to see why the transcript is over 7,000 pages. The record is a vast tautology of seven experts saying basically the same things from different viewpoints. Nearly 2,000 pages of the record were hearings out of the presence of the jury. When the fact that everything was said seven times in the term taking and seven times in the fee taking is acknowledged and the non-jury hearings accounted for, the record does not appear nearly so formidable.

Similarly, when one understands the record, the quotations out of context made in appellants' brief, pp. 19-22, are perfectly understandable and would occasion no confusion. For example, the consideration passing between Mr. Carlstrom and the charitable organizations was never given to the jury except one reference in appellants' opening statement. The stricken leases would not have bothered the jury for the simple reason that all admissible leases were before the jury on Exhibits 25-S and 33. The railroad parcels were withdrawn from the jury's consideration, and it can be shown that it understood the withdrawal because it made no award for these parcels. The court's instruction to disregard the attempt to give the jury a set of figures from which it could calculate reproduction cost new of these buildings is explained in our Statement, *supra*, pp. 58-60. Even if the jury used the forbidden percentage figure, it would hardly be to appellants' detriment, nor could they have just grounds for complaint. The

other quotations out of context are as easily explainable, but we shall not elaborate the point further.

In summary, the trial of this case was conducted to present the evidence and issues to the jury in an easily comprehensible manner. Appellants would require a new trial to divide the case into two—the term taking and the fee taking. They fail to show, however, how that would substantially change the situation. There is, we submit, no warrant for imposing such a procedure which, at best, would be time-wasting and might well prejudice the Government by overlapping awards. Cf. *Phillips v. United States*, 243 F. 2d 1 (C.A. 9, 1957).

II

THE COURT WAS CORRECT IN ITS MISCELLANEOUS RULINGS ON EVIDENCE OF WHICH APPELLANTS COMPLAIN

A. *Evidence of the cost of rehabilitating the property for its highest and best use is a properly admissible factor to be considered by the jury.*—Mr. John Hallock testified for the Government on the condition of the property on the date the Government was given possession, May 1, 1953 (R. 671–1005). Mr. Hallock determined the state of repair of each building, and what, if anything, would be required “to bring it up to a standard of normal maintenance, to make it a useful facility for industrial or commercial work” (R. 677–678). In enumerating the repairs and rehabilitation required Mr. Hallock used photographs of the specific defects to illustrate the type of repairs needed. Appellants conceded in the

court below that these photographs “may be true and correct representations of the particular area that is involved in the photograph * * *” (R. 682). They objected, however, that such photographs were not “a true, correct and full representation of the entire property * * *”. (*Id.*) Of course, they were presented to the jury only as “specific pictures and closeups of particular defects * * *” (R. 689-690). At the same time the court told the jury the nature of the photographs, it added that “there are areas where no defects appear, but the Government has taken no pictures of these areas” (R. 690). Under the circumstances in which they were introduced, the photographs could not possibly have been misleading. Appellants waived foundation at the time the photographs were introduced, and agreed the pictures depicted what they purported to depict (R. 689). It hardly needs discussing that photographs under the facts here are admissible evidence. As Wigmore says, “A photograph, like a map or diagram, is a witness’ pictured expression of the data observed by him and therein communicated to the tribunal more accurately than by words. Its use for this purpose is sanctioned beyond question.” Wigmore on Evidence, Sec. 792 (3d ed.). Whether particular photographs will be allowed is a matter in each case that lies within the discretion of the trial judge. *Millers Nat. Ins. Co. v. Wichita Flour Mills*, 257 F. 2d 93, 100 (C.A. 10, 1958); *Luther v. Maple*, 250 F. 2d 916, 921 (C.A. 8, 1958); *Drohan v. Standard Oil Company*, 168 F. 2d 761, 765 (C.A. 7, 1948).

Appellants also claim it was objectionable to allow Mr. Hallock, after he recited the defects to estimate how much it would cost to bring the property to a condition where it would be useful and usable. Where this question was raised, the court held that it is reversible error to exclude testimony as to the amount that would be necessary to be expended to make a property usable for its highest and best use. *Hickey v. United States*, 208 F. 2d 269, 276-277 (C.A. 3, 1953), cert. den. 347 U.S. 919. Obviously, an intelligent buyer of property would be vitally concerned with how much it would cost to rehabilitate such property, especially where, as here, there was serious and extensive maintenance work that needed to be done (R. 690-797).

Kinter v. United States, 156 F. 2d 5 (C.A. 3, 1946), on which appellants rely in their brief, is not germane to the issue appellants raise here (Br. 36). As the court of appeals for the Third Circuit in the *Hickey* case, *supra*, pointed out, the question in *Kinter* was whether the landowner should be allowed to recite the cost of *past repairs* to support his opinion of market value. The *Kinter* case is absolutely correct in its holding, but is not applicable here because the United States was not trying to introduce the cost of *past repairs* to this property. It only wanted to show how much a purchaser could expect to have to pay out of pocket on the date of taking to repair the property.

B. *The district court ruled correctly and within the scope of its judicial discretion by eliminating from the cross-examination of Mr. Hallock repetitious and remote questions that threatened to prolong the trial*

greatly.—The specific question about which appellants are complaining in their point II B (Br. 37–42) is this: “Q. Do you have any knowledge as to whether or not the sewer facilities that you have been referring to have been done [repaired?] during the period from May 1, 1953 down to the present time” (R. 995–996)? The purpose of this question, according to counsel for appellants, was to test the credibility of Mr. Hallock’s opinion that the condemned properties were “not a useful facility for industrial purposes during the period of time that I inquired about” (R. 996). Counsel for appellants further elaborated that he felt he was “entitled to test the credibility of this witness’ opinion that certain things must be done to make it a useful property for industrial purposes, to find out whether or not it’s operated for four or five years without it” (R. 997). To this argument the court cogently remarked that “The witness has stated to you in reply to your questions, Mr. Burrill, that this question of usefulness is a matter of degree. And he has given several examples which seem intelligent to me. And I think they were probably understandable to the jury” (R. 997–998).

Some of the questions the court referred to appear in the immediately preceding colloquy beginning at page 989 of the printed record. Counsel for appellants there also wanted to test Mr. Hallock’s opinion “* * * that all these things were necessary * * * for the operation of this property for an industrial purpose. And, as I further understand his testimony, that he said that it was essential that they be done promptly as of May 1, 1953” (R. 990). Mr. Hallock

immediately denied that such had been his testimony. Mr. Hallock's prior testimony was then read, and the operative phrase was, "to bring it up to a standard of normal maintenance, to make it a useful facility for industrial or commercial work" (R. 990-991). Mr. Hallock was then questioned extensively on this subject, and explained "* * * maintenance can be deferred and deferred and deferred until a building falls down, if you want to" (R. 992). Without the maintenance, the property "could be useful, but not fully useful" (R. 993). He gave as an example that certain blackout curtains inhibited the lighting, and one cannot have efficiency with poor lighting. Counsel for appellants wanted to know, "Isn't it a fact that those blackout curtains have not been removed up to the present time?" Mr. Hallock replied that is a fact, and that the reason for it was that money had not been forthcoming to Convair from the Government to do the work (R. 993). Counsel for the appellants then branched out into other fields. He asked about repair on the heaters between January 1, 1951, and May 1953 (R. 994). He asked about toilet facilities and transformers (R. 995). He then went into the question about sewer repairs quoted above during the period between May 1953 and the date of trial. The court quite properly felt that the line of inquiry was getting too remote and sustained the objection to the question (R. 996). "To open up a question of what had been done thereafter [after May 1953] would be to multiply this case endlessly. We would then have problems as to how much of the work, if all, was done, why it was done; what judgment was

used and what was done or what was not done. And none of it would be of assistance in judging the opinion of this witness" (R. 996).

The objectionable line of questioning came after Mr. Hallock's cross-examination had proceeded for a full day and a half, and covered over 200 pages of the record. The cross-examination had touched specifically on what constituted a useful facility, deferred maintenance, and whether the plant had in fact been used without the repairs being made, at least three times prior (R. 813-815, 829-831, 980-982). The witness was cross-examined extensively on every item and cost on his rehabilitation report (R. 815-1005). It is plain from the record that the witness was speaking in his rehabilitation report of repairs that "ought to be" and not necessarily of those that "have to be". Even the simplest person knows the difference between repairs that ought to be made to property and those that actually get done. Certainly this blue ribbon jury understood what Mr. Hallock was talking about. The court was surely correct when it noted that going into what repairs were actually made, when and why, after May 1, 1953, was not a vital necessity to the jury in judging this witness' opinion.

When dealing with evidence, such as the condition of the property, relating directly to value, the district court had wide discretion. As this Court said in *United States v. Block*, 160 F. 2d 604, 607 (1947), "In proceedings of this character, a judicial discretion in admitting or rejecting evidence as to value is vested in the trial court, and where no abuse of that discretion is shown, such rulings should not be disturbed on

appeal." *Stephens v. United States*, 235 F. 2d 467, 471 (C.A. 5, 1956); *Foster v. United States*, 145 F. 2d 873, 875 (C.A. 8, 1944); *Ramming Real Estate Co. v. United States*, 122 F. 2d 892, 895 (C.A. 8, 1941). There was certainly no abuse of discretion in the action of the trial court here to limit remote and repetitious cross-examination.

The United States is aware, of course, that a few cases indicate under severely restricted conditions, facts occurring after the date of valuation may be shown as tending to prove or disprove the accuracy of an opinion formed at the date of valuation. The cases, when properly limited, are correct. Thus, in *United States v. Westinghouse Co.*, 339 U.S. 261, 267-268 (1950), the court indicated that in valuing the taking of an indeterminate portion of the term of a leasehold estate, it would be proper to wait until the length of the taking was definite to see if moving costs should be allowed. In *United States v. Brooklyn Union Gas Co.*, 168 F. 2d 391, 397 (C.A. 2, 1948), they were valuing the taking of a portion of a public utility system, and it was held proper to see if the utility had in fact lost any business because of the taking. Also in *Hickey v. United States*, 208 F. 2d 269, 277-278 (C.A. 3, 1953), cert. den., 347 U.S. 919, where an engineer formed an opinion on the condition of covered plumbing and heating systems as of the date of valuation, he was permitted to say that after the date of valuation when the pipes were uncovered his opinion was verified. If in this case, appellants had merely wanted Mr. Hallock to testify whether any subsequent inspection of the property verified or re-

futed his opinion of the repairs necessary, that might have similarly been admissible. But appellants wanted to go far beyond this. They wanted him to testify to all repairs that had been made, and the general history of the property in this respect from the date of valuation until the trial. In final analysis the case would have been thrown wide open to everything that had happened at the plant up to the time of the trial. The district court wisely observed that it was immaterial after the date of valuation whether the plant fell into the ocean (R. 982, 997). This is in accord with the general rule that valuation of land in a condemnation proceeding must be determined as of the time of the taking. *United States v. Miller*, 317 U.S. 369, 374 (1943); *Danforth v. United States*, 308 U.S. 271, 283 (1939); *McKendry v. United States*, 254 F. 2d 659, 662 (C.A. 9, 1958). As this Court said in *State of Washington v. United States*, 214 F. 2d 33, 47 (1954), cert. den., 348 U.S. 862, "A condemnation case involves a taking, as of a certain date, and the case is tried with the eyes of the court and jury fastened to the date of taking, and some short but reasonable period before or after the taking." Therefore, the rejection of questions about general repairs up to the time of the trial was proper because it concerned events long after the date of taking in addition to being evidentially remote and repetitive.

C. *Reproduction costs are not a reliable guide to fair market value and were properly rejected as direct evidence in this case where other evidence of a more trustworthy nature was available.*—The defendants made an offer to prove that the cost of construc-

tion new of the buildings and facilities condemned here, except Building 8 and other facilities located on Parcel 1, as of May 1, 1953, was \$15,069,140, and the cost new less depreciation, including straight line depreciation, functional depreciation and deferred maintenance, would be \$9,217,397 (R. 1035). The matter was discussed at some length in chambers (R. 1031-1048). Next day the court made its ruling as follows:¹¹

First, I am going to sustain an objection to the introduction in evidence of expert testimony of dollars and cents value as to reproduction costs, reproduction costs less depreciation, or reproduction costs new less depreciation, whatever way it might be offered. Tr. 1903; 164 F. Supp. 451, 488.

Now, on the other hand, I am going to permit the experts for the defendants to state, in general terms, what factors they took into account in arriving at their opinion, including a statement by them, if they desire, that they took into account a factor of reproduction cost less depreciation. Tr. 1905; 164 F. Supp. 451, 489.

The district court's reasons for its ruling as stated in the accompanying discussion will be elaborated on momentarily. The court instructed the jury on the use of expert opinion on reproduction costs in two places

¹¹ The same opinion, revised somewhat for publication, is reported in *United States v. 70.39 Acres of Land*, 164 F. Supp. 451, 488-490. This appeared in the original trial transcript at pp. 1903-1910. The district court has also summarized the argument of counsel in chambers on this question. 164 F. Supp. 451, 488. In the original transcript the material is found at pp. 1655-1691, 1729-1754. Most of this has not been included in the printed record.

(R. 1917-1922, 2097-2098). The substance of these instructions is contained in these two paragraphs (R. 1918, 2098) :

The problem we got into involves this matter of reproduction cost new less depreciation. Now reproduction cost new less depreciation is not market value, and therefore the court has excluded evidence as to the figures on reproduction cost new. Certain experts, the defendants' experts that you have heard testify, have said that in forming an opinion they considered reproduction cost new less depreciation as a check against some opinion they arrived at as to fair market value. That the court has permitted. The expert may express to you his reasoning process in arriving at his opinion of fair market value. But the defendants' experts, each of them, have disclaimed that reproduction cost new less depreciation was market value, but that instead it was merely a check. To that extent it was permissible.

Reproduction costs new, less depreciation, plus the value of the land, is not fair market value. However, reproduction costs new of the improvements located on the various parcels, less depreciation, plus the land value, may be considered by an expert witness as one approach in forming his ultimate opinion of fair market value or as a check upon his final opinion of fair market value. This would apply both to valuation of the term taking and the fee taking.

The district court gave three reasons for excluding from evidence the reproduction cost less depreciation of the improvements. First, the compensation in a condemnation case is fair market value, and reproduc-

tion cost is remote from and has little bearing on fair market value. Second, the introduction of expert testimony on reproduction costs separately values the buildings from the land. Third, the introduction of reproduction costs tends to mislead the jury in fixing what a willing buyer would pay a willing seller in the market place, and would divert them from their consideration of comparable sales as the best evidence of value (Tr. 1903-1905; 164 F. Supp. 451, 488-489).

The measure of just compensation in a condemnation case is fair market value, and the best evidence of fair market value is comparable sales. *United States v. Toronto Nav. Co.*, 338 U.S. 396, 402 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372, 377 (1946); *United States v. Miller*, 317 U.S. 369, 373-375 (1943); *Olson v. United States*, 292 U.S. 246, 255-257 (1934); *Cole Investment Co. v. United States*, 258 F. 2d 203, 205 (C.A. 9, 1958); *Goodyear Farms v. United States*, 241 F. 2d 484, 485 (C.A. 9, 1956); *Simmonds v. United States*, 199 F. 2d 305, 307 (C.A. 9, 1952); *United States v. 5139.5 Acres of Land*, 200 F. 2d 659, 662 (C.A. 4, 1952); *United States v. Ham*, 187 F. 2d 265, 270 (C.A. 8, 1951); *United States v. Pennsylvania-Dixie Cement Corp.*, 178 F. 2d 195, 198-200 (C.A. 6, 1949); *Kinter v. United States*, 156 F. 2d 5, 7 (C.A. 3, 1946); *Fain v. United States*, 145 F. 2d 956, 957 (C.A. 6, 1944); *Baetjer v. United States*, 143 F. 2d 391, 397 (C.A. 1, 1944); *Love v. United States*, 141 F. 2d 981, 983 (C.A. 8, 1944); *Welch v. Tennessee Valley Authority*, 108 F. 2d 95, 101 (C.A. 6, 1939).

Where there is a market price for the property condemned established by contemporaneous sales in

the open market that price is "just compensation" and other evidence of "value", such as capitalization of income or reproduction costs, would not be pertinent at all. *United States v. New River Collieries*, 262 U.S. 341, 344 (1923); *Vogelstein & Co. v. United States*, 262 U.S. 337, 340 (1923); *St. Joe Paper Co. v. United States*, 155 F. 2d 93, 96-97 (C.A. 5, 1946); *W. T. Grant Co. v. Duggan*, 94 F. 2d 859, 861 (C.A. 2, 1938); *Olson v. United States*, 67 F. 2d 24, 29 (C.A. 8, 1933), affirmed 292 U.S. 246, 257 (1934). Of course, this perfect market price is mostly found in fungibles such as coal or copper, as in the *New River Collieries* and *Vogelstein* cases. In real property there are rarely enough transactions involving identical property to give such an indisputable market price. Usually, as in the present case, there is some dispute as to the extent to which sales are comparable. But this does not change the objective in valuing property, i.e., what a willing buyer would pay a willing seller when neither are acting under compulsion. It simply renders proof of this more difficult, and calls for weighing the incomparable elements of similar sales along with the comparable elements. *United States v. Toronto Nav. Co.*, 338 U.S. 396, 402 (1949). Thus, in the present case there were over 50 recent sales of industrial and commercial property in the vicinity of Convair Plant #2, although admittedly none of them was as large as most of the parcels and tracts at the plant, except the two sales involving this same plant (R. 2168-2169). But this difference of size was merely an element to be taken into consideration, with these sales of similar

type properties still the best evidence of fair market value. The jury also had before it the testimony of the experts on capitalization of income and their opinions of fair market value taking into account all three factors.

It was certainly not error in these circumstances for the district court to exclude an extended discussion of the collateral issue of the cost of reproducing the buildings. Of the standard approaches which experts use in valuing property, reproduction cost almost universally has been discussed for its infirmities and been thoroughly discredited by so many courts. As the Supreme Court said in *United States v. Toronto Nav. Co.*, 338 U.S. 396, 403 (1949): "Original cost is well termed the 'false standard of the past' where, as here, present market value in no way reflects that cost. So with reproduction cost, when no one would think of reproducing the property." One of the earliest cases to consider the problem, *Devou v. City of Cincinnati*, 162 Fed. 633, 635 (C.A. 6, 1908), cert. den., 212 U.S. 577, stated: "It seems clear to us that the effort of the defendant below was not to enlighten, but rather to confuse and mislead, the jury from a consideration of the actual value of the land and buildings as they are now into a consideration of their cost, of what they might be valued at as buildings alone, irrespective of the ground." In *United States v. 44.00 Acres of Land*, 234 F. 2d 410, 412-413 (C.A. 2, 1956), cert. den., 352 U.S. 916, it was held that a valuation of an industrial building based primarily on reproduction cost new less physical depreciation and the cost of the land was erroneous, and

Orgel's work, *Valuation Under Eminent Domain* (1953 ed.), sec. 188, is quoted as follows:

It is not difficult to understand the modern appraiser's skepticism of land value plus structural cost as a measure of the market value of improved real estate. Such a figure would be acceptable only on the assumption that the buyer of the property would want to erect a substantially identical structure in case the existing one were not there. The market value of the mere land is a value that can be availed of by the owner only by erecting on it that type of building which is now best adapted to it. But if the existing building is not of that type—which is almost sure to be the case in this dynamic age, unless the structure is very new—then the improvement does not enhance the value of the whole property by the amount of the reproduction cost. * * *

In *Kinter v. United States*, 156 F. 2d 5, 7 (C.A. 3, 1946), the court stated, "Admittedly, cost is not synonymous with market value. *A fortiori*, cost of land and cost of improvements taken separately and added are not to be equalized with fair market value."

"There is no necessary relationship between reproduction cost and market value," held the Court of Appeals for the District of Columbia Circuit in *Riley v. District of Columbia Redevelop. Land Agency*, 246 F. 2d 641, 644 (1957). For another authority discussing the unreliability of the reproduction cost approach to valuation see *United States v. 49,375 Square Feet of Land in Manhattan*, 92 F. Supp. 384, 387-388 (S.D.N.Y., 1950), affirmed *per*

curiam sum nom. United States v. Tishman Realty & Construction Company, 193 F. 2d 180 (C.A. 2, 1952). In rejecting reproduction and original costs the Fifth Circuit in *Bowie Lumber Co. v. United States*, 155 F. 2d 225, 228-229 (1946), said:

The refusal of the court to permit owners to introduce evidence touching the original cost of the building on a cubic foot basis, and also the estimated cost of the reproduction of the Poydras Building was not prejudicial error. Manifestly, such evidence was remote in point of time as to original cost. [Citing authorities.]

It could not be helpful to the jury to permit evidence of the reproduction of the building by owner's witness, the Assistant City Architect. The building had stood for over forty-six years and the cost of reproduction in the year 1943 would, in all probability, mislead the jury.

Even in those cases where reproduction costs have been considered, the courts have repeatedly felt it necessary to caution on the limitations and frailties of this type of evidence. Thus, the Supreme Court in *Standard Oil Co. v. Southern Pacific Company*, 268 U.S. 146, 156 (1925), warns: "It is to be borne in mind that value is the thing to be found and that neither cost of reproduction new, nor that less depreciation, is the measure or sole guide."

In *United States v. Savannah Shipyards*, 139 F. 2d 953, 956 (C.A. 5, 1944), reh. den. 140 F. 2d 863, the court cautions:

* * * in view of the fact that the issue in condemnation proceedings is not the cost of production or reproduction, but the fair market

value, proof as to the reproduction cost or production cost is collateral to the real issue. Recent cost of construction is merely a circumstance that the jury might consider as having some bearing on fair market value in situations *where there is no available evidence of market value.* * * * *If the actual cost of construction had been ascertained to the penny, the jury would still have been required to ascertain fair market value* * * * [Emphasis added.]

In *United States v. Wise*, 131 F. 2d 851, 852 (C.A. 4, 1942), the court would hold only that the admissibility of reproduction costs "is largely governed by the peculiar circumstances of each case and rests to a great extent in the discretion of the trial judge." Even so, the court felt it necessary to quote at length the charge to the jury by the district court that reproduction cost was not the measure of compensation, and the limitation on its use. It was held in *United States v. Boston, C.C. & N.Y. Canal Co.*, 271 Fed. 877, 889 (C.A. 1, 1921), that reproduction costs could not be considered unless the court or jury was first satisfied "that a reasonably prudent man would purchase or undertake the construction of the property at such a figure." The district court obviously could not have made the required affirmative finding in this case. In practically all the cases where the introduction of this type of evidence has been upheld, the circuit courts have been careful to point out either the uniqueness of the property, or the absence of any comparable sales or other type evidence on which to base an award. See, for example, *United States v. 2.4 Acres*, 138 F. 2d 295, 298 (C.A. 7, 1943) (no

sales); *United States v. Savannah Shipyards*, 139 F. 2d 953, 954 (C.A. 5, 1944), reh. den., 140 F. 2d 863 (no comparable sales of shipyards in the course of construction); *United States v. Two Acres of Land*, 144 F. 2d 207, 209 (C.A. 7, 1944) (church property); *United States v. Boston, C.C. & N.Y. Canal Co.*, *supra* (condemnation of a canal). By contrast, see the cases relying on comparable sales, *supra*, p. 99. None of them feel it necessary to explain why other approaches to value are not used. Obviously, all of these cases together point out why courts reject reproduction costs where any other standard of value is available. The district court properly rejected appellants' offer to prove reproduction costs of the buildings for the reasons stated in its opinion, to wit: such costs are remote from the issue of fair market value, and their introduction would tend to mislead the jury as to what the true measure of compensation is.

If further reason be needed, the district court was also correct in stating that such evidence is a separate valuation of the buildings from the land. This likewise tends to confuse the jury and leads to a piecemeal valuation of the property. This Circuit has announced its intention to follow the established rule in *United States v. Honolulu Plantation Co.*, 182 F. 2d 172, 178 (1950), where this Court said: "It is likewise perfectly true that the land cannot be valued alone without buildings or other structures which have been added thereto and which are a part of the real property. According to common law, these are as much a part of the soil as are the rocks,

sand and other natural features.” Other cases which follow this view are *United States v. Certain Parcels of Land*, 149 F. 2d 81 (C.A. 5, 1945); *United States v. Meyer*, 113 F. 2d 387, 397 (C.A. 7, 1940); *Morton Butler Timber Co. v. United States*, 91 F. 2d 884, 888 (C.A. 6, 1937).¹² For this additional reason, there was no error in rejecting reproduction cost new less depreciation of the buildings and improvements.

D. Government needs for a particular type of property cannot be considered in determining just compensation.—To be clearly understood, the introduction and subsequent striking of certain Convair leases from the evidence before the jury must be presented in the correct time sequence. When the first real estate expert, Mr. Sayer, was testifying, the question arose as to whether certain leases made by Convair as a government contractor of the subject property should be admitted in evidence. There was a long discussion of the issue in chambers which has not been printed (Tr. 2150–2269). The court initially ruled that the leases between Convair and

¹² This is not to suggest that in valuing the property as a whole an expert cannot state how much of the total a building or other improvement contributed. As was said in the *Meyer* case, “All of the facts and circumstances bearing upon the condition and nature of the land as a whole and its possible use are proper as elements bearing upon value, but separate appraisements of the different elements constituting the whole are improper.” 113 F. 2d 397. See also *United States v. City of New York*, 165 F. 2d 526, 528–529 (C.A. 2, 1948). To have allowed the witnesses for appellants to go through the involved process of calculating reproduction cost new less depreciation of the buildings would have been just such a “separate appraisal” of a fractional part of the whole and would have tended to divert the jury from the real issue.

Carlstrom could be referred to by the experts just as any other comparable leases (Tr. 2217). Following the doctrine announced by the Supreme Court in *United States v. Cors*, 337 U.S. 325, 333 (1949), the court ruled it would be a jury question whether needs of the Government influenced the rentals paid.

In order that the jury might appreciate the facts being developed as the case progressed, the court gave the jury a summary of the contentions the parties were making with regard to these leases (R. 1223-1228). In this connection the court instructed that if there had been a general increase in value throughout the area due to government activities, such as the Navy Base, Air Station and government contractors generally, and if the Convair leases are in line with such general increase throughout the area, then these leases could be considered the same as any other (R. 1226-1227). "If on the other hand, in the Convair leases and the rentals provided there is an increment or increase not caused by the general condition in the area, but caused by the necessity of the Government acting through Convair, the contractor, for storage space and other facilities—in other words, for facilities for the particular kind as are involved in this case in the particular area nearby the Convair Plant No. 1, then such increment must be segregated by the jury and not considered in arriving at fair market value" (R. 1227). Mr. Sayer then testified about the Convair leases. (See Statement, *supra*, pp. 28-29.)

When the Government presented its case on the term taking, it sought to show by its first witness that

Convair was the agent of the United States, that the rentals were in fact largely paid by the United States and that the price and circumstances indicated that they were entered into on the compulsive need of the Government's agent for this particular type of property (R. 1423-1507). Mr. Robert B. Watts, vice president and general counsel of Convair at San Diego, who was in charge of real estate matters, was the witness for this purpose (R. 1423). Mr. Watts' testimony has been summarized in the Statement, *supra*, pp. 37-40. To illustrate his testimony, Exhibit J had been prepared, which named the various contracts between the Government and Convair and gave certain pertinent data, such as dates, type of contract, subject matter of the contract, whether Convair was prime or subcontractor, etc. (R. 1444-1451). The exhibit was admitted over appellants' objection "merely to illustrate the testimony which the witness will give concerning the contracts and their performance at San Diego with the Government for military equipment" (R. 1451). Mr. Watts' accompanying evidence brought out that Mr. Carlstrom was reluctant to lease the Convair people additional space in Plant #2 under any circumstances, and would only do so after they threatened condemnation and Mr. Carlstrom demanded and got an increase in rentals (R. 1463-1464).

Again at the beginning of the fee valuation the United States moved to exclude these Convair leases, "upon the grounds that those leases represent the compulsion which was attended by the Government's military necessity, as shown by the testimony of Mr. Watts * * *" (R. 1740). This time the court sus-

tained the Government's motion (R. 1745). The court thereupon instructed the jury to forget any Convair leases entered after January 1, 1951, with one exception, and they were removed from Exhibit 25 (R. 1754).

In a later discussion clarifying exactly what portion of the transcript and exhibits it was necessary to strike to eliminate the stricken Convair leases, the question arose as to whether the terms of the leases other than rental paid should also be stricken (Tr. 5154-5164). Counsel for the appellants argued that "the leases are also offered on the issue of whether there was reasonable probability of unitization, *irrespective of the rental values fixed in the leases*" (Tr. 5156; emphasis supplied). The court called for more argument on whether the "leases would still have, as to area, location and so forth, some value on the unitization question" (Tr. 5161). At the conclusion of this argument the court ruled, "I am leaving the unitization question to the jury, and I will let them consider the leases as to area, location and so forth on the unitization question, but not the rents" (Tr. 5164).

Under the circumstances of this case it is somewhat surprising to see appellants (Br. 47) "respectfully submit that it was the duty of the trial court to admit all the evidence and exhibits respecting the Convair-Government contracts and Convair-Carlstrom leases or else to reject all of it." For all practical purposes the court *did*, at appellants' insistence, admit all of this evidence except those portions which were clearly inadmissible, i.e., the rentals. As for the testimony of Mr. Watts on aircraft manufacturing con-

(C.A. 2, 1944), cert. den., 323 U.S. 726 (1944). It provides no realistic or fair standard by which to judge the market.

It is a fundamental principle in determining just compensation that "special value to the condemnor as distinguished from others who may or may not possess the power to condemn has long been excluded as an element from market value." *United States v. Cors*, 337 U.S. 325, 333 (1949); *United States v. Miller*, 317 U.S. 369, 375 (1943); *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 76 (1913). In *United States v. Petty Motor Co.*, 327 U.S. 372 (1946), the court said (p. 377) that the value of the interest taken "is not the value to the owner for his particular purposes or to the condemnor for some special use but a so-called 'market value.'"

That principle has led to the rule in the federal courts (including this Court) that the amounts paid by the condemnor for the same or other property are not even evidence of market value, and, therefore, are not admissible on that issue. *Justice v. United States*, 145 F. 2d 110, 111 (C.A. 9, 1944); *Murdock v. United States*, 160 F. 2d 358, 362 (C.A. 8, 1947); *United States v. 13,255.53 Acres of Land, Etc.*, 158 F. 2d 874, 877 (C.A. 3, 1946); *United States v. Foster*, 131 F. 2d 3, 5 (C.A. 8, 1942), cert. den. 318 U.S. 767 (1943); *United States v. Reynolds*, 115 F. 2d 294, 296 (C.A. 5, 1940); *United States v. Bailey*, 115 F. 2d 433, 434 (C.A. 5, 1940); *Five Tracts of Land v. United States*, 101 Fed. 661, 663-665 (C.A. 3, 1900); *United States v. Beaty*, 198 Fed. 284, 291 (W.D. Va., 1912), reversed on other grounds, 203 Fed. 620 (C.A.

4, 1913): cf. *Westchester County Park Commission v. United States*, 143 F. 2d 558, 693 (C.A. 2, 1944), cert. den., 323 U.S. 726.

Those rulings are plainly applicable in this proceeding. What the Government might be willing to pay, or to have its contractor pay, as rental for the temporary use of land in expanding to meet a war emergency could have no probative value in determining the fair annual rental of such property on the open market.

In *United States v. Hayman*, 115 F. 2d 599 (C.A. 7, 1940), proceedings were brought to condemn fee title to land occupied by the United States under a lease and on which it had constructed beacon towers. The landowner argued that market value was enhanced because prospective purchasers would consider the fact that the United States would renew the lease or condemn the fee in order to avoid the expense of removal of the towers. The court sustained the exclusion of evidence to support this contention because it represented special value to the United States. See also *United States v. Delaware, Lackawanna & W.R. Co.*, 264 F. 2d 112, 115-116 (C.A. 3, 1959), where evidence of a lease to the Government's contractor was not grounds for reversal only because the ultimate award clearly showed the evidence had been rejected as a basis for evaluation.

It was not seriously disputed as to who was actually paying the rents on the Convair leases, although there was an issue on whether a formal agency relationship existed between Convair and the Government. These rents were placed in an overhead pool, and during the

period subsequent to 1950 the Government paid between 85% and 95% of the total (R. 1502). Not only was the Government paying the bill but the record shows that Convair was in constant touch with the Government with respect to its leases (R. 1464, 1467, 1468, 1469, 1470). It is further clear from Mr. Watts' testimony that all Convair expenditures were being constantly audited by government accountants. Whatever the relationship may be for other questions, certainly for purposes of these leases Convair was the Government's agent. The holding of *United States v. Five Parcels of Land*, 180 F. 2d 75 (C.A. 5, 1950), cert. den., 340 U.S. 812, is very pertinent:

The [Houston] Shipbuilding Corporation was an agency of the United States and for the purposes of this discussion it will be treated as if it were the United States, since the improvement of the lands, the building of the facilities and improvements, the operation of the shipyard, and the building of ships were all for the United States and at its expense.¹³

It having been shown that the excluded leases were used largely for building military aircraft, and that

¹³ The situation will be governed by the substantial equitable principles viewing the case as a whole, not by the technical rules of agency. As it was recently said in another condemnation case involving the same fundamental principle of excluding values attributable solely to the Government's needs or activities with regard to the particular property, to view the controversy as one merely between private parties under State law "strips it of its life giving, its flesh and blood, elements" and such cases will not be controlled by "invocation of the dry as dust legal principles as to fixtures controlling the relation of an ordinary landlord and tenant * * *." *Bibb County, Georgia v. United States*, 249 F. 2d 228, 230 (C.A. 5, 1957).

the leases were made during the Korean War emergency, with the Government paying most of the rentals and approving such leases, the district court properly excluded them as reflecting only pressing governmental needs and not fair market transactions.

E. *The district court was correct in ruling that the previous sale of the same property and Carlstrom's admissions against interest in a tax proceeding were admissible and in excluding evidence of fair market rental value 14 months after the date of taking.*—We turn now to the three final complaints made by the appellants about the admission and exclusion of evidence (Br. 48–57). With respect to Point E, evidence of what the same property sold for previously has been upheld by the federal courts on numerous occasions and whether a sale is too remote in time is entirely a matter within the discretion of the trial judge. This Court stated the rule in *Simmonds v. United States*, 199 F. 2d 305, 307–308 (1952) :

Finally, *Simmonds* alleges that the District Court committed prejudicial error in admitting testimony of the price which *Simmonds* paid for Tract No. 7 in 1944 to be admitted as evidence of the 1948 value. He contends that the 1944 purchase date was too remote from the 1948 valuation date to be of any probative value; and that the low purchase price unduly prejudiced the jury in fixing the value of the property. However, compensation for condemned lands is measured by market value, and the price paid at prior sales of the same property, reasonably recent and not forced, are evidence of market value. [Citing *United States*

v. *Bechtold Co.*, 129 F. 2d 473, 479 (C.A. 8, 1942), and other cases.] * * * Any changes in circumstances between 1944 and 1948, as they affect the value of the property, would go to the weight to be given to the 1944 purchase price, but not to the admissibility of such evidence. *United States v. Bechtold Co.*, supra.

In the *Bechtold* case, relied on by this Court, the Eighth Circuit had held a prior purchase of the same property admissible. "The fact that the purchase was made some fourteen years before the date of taking the property went to the weight of the evidence, rather than to its admissibility. The court in its discretion properly admitted the testimony." 129 F. 2d 473, 479. Other cases holding prior sales of the same property admissible are: *Riley v. District of Columbia Redevelop. Land Agency*, 246 F. 2d 641 (C.A.D.C., 1957) (three years prior to date of valuation); *International Paper Company v. United States*, 227 F. 2d 201, 208 (C.A. 5, 1955); *United States v. Ham*, 187 F. 2d 265, 269-270 (C.A. 8, 1951) (three and five years); *Dickinson v. United States*, 154 F. 2d 642 (C.A. 4, 1946) (six years); *Foster v. United States*, 145 F. 2d 873, 875 (C.A. 8, 1944) (eight years); *Love v. United States*, 141 F. 2d 981, 983 (C.A. 8, 1944) (seven years). Since issues as to comparability are eliminated the courts are more liberal as to the time element in cases of sales of the same property than with comparable sales.

The district court was equally correct in admitting the petitions which Carlstrom made in an effort to have his tax assessment on the subject property re-

duced (R. 1508-1509). "While an actual assessment for taxes made by a public officer is not admissible on a trial to establish market value, a tax return or a statement of value made by the owner is admissible as an admission against interest. *McCandless v. United States*, 9 Cir., 74 F. 2d 596, 603-4; *Dubinsky Realty Co. v. Lortz*, 8 Cir., 129 F. 2d 669, 673; *Bowie Lumber Co. v. United States*, 5 Cir., 155 F. 2d 225, 228; *Redman v. United States*, 4 Cir., 136 F. 2d 203, 206; * * *." *Murdock v. United States*, 160 F. 2d 358, 362 (C.A. 8, 1947). In the *Redman* case, *supra*, which also relies on this Court's decision in *McCandless v. United States*, *supra*, the court said: "It is finally contended on behalf of the appellants that they were prejudiced by the court's ruling admitting in evidence an application, by the appellants sworn to by appellant W. Carroll Redman, for a reduction of the assessed value of the property in question in 1938. * * * The great weight of authority is to the effect that such evidence is admissible under proper instructions by the trial court as to the conditions surrounding the application for reduction in taxation." 136 F. 2d 203, 206. The instructions which the court gave the jury at the time this evidence was received left nothing to be desired in clarity (R. 1629-1636). Indeed, one of appellants' own counsel said, "Without in any way waiving our objections, I think your statement has been an eminently fair statement to both sides, without any question about it" (R. 1636). The court again gave a clear and precise instruction on the tax reduction evidence in its charge to the

jury (R. 2086-2088). The court also had a tag placed upon each of the exhibits relating to reduction of tax assessments to refresh the jury's recollection as to the limited consideration it could give them (R. 2087). Not only was there no error, but the court went a great deal further than the minimum required to be fair to appellants.

The final complaint in appellant's brief about the admission and exclusion of evidence, Point G, is that the court should have heard evidence of the fair market rental value for the lease period from July 1, 1954, to June 30, 1955. The date of the term taking was May 1, 1953, on which date the United States took a term of 14 months and the option to renew for yearly periods thereafter until 1958 (R. 5). This taking, both of the 14-month term and the option to renew, was to be valued as of the date of taking. See *supra*, pp. 95-96. The district court has discussed at length the perfectly plain and logical proposition that by taking and paying for an option to renew the lease, the United States has acquired the right to renew the lease at the same rate of rental. *United States v. 70.39 Acres of Land*, 164 F. Supp. 451, 463-467. There is nothing which need be added to this excellent opinion. We particularly invite the Court's attention to the fact, noted by the district court, that the United States has the power to take all the additional terms it wants, and therefore has no reason to pay for an option except for the right to renew *at the same rate of rental* (164 F. Supp. 464-465).

CONCLUSION

For the foregoing reasons the judgment of the district court is correct and should be affirmed.

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SEPTEMBER 1959.



United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES W. CARLSTROM, SOUTHERN
CALIFORNIA CHILDREN'S AID FOUNDA-
TION, INC. , a corporation, SOUTHERN
CALIFORNIA DISTRICT COUNCIL OF THE
ASSEMBLIES OF GOD, INC. , a corpora-
tion, and THE SALVATION ARMY, a
corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF

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FILED

OCT 28 1959

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No. 16323

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES W. CARLSTROM,
SOUTHERN CALIFORNIA CHILDREN'S
AID FOUNDATION, INC., a corporation,
SOUTHERN CALIFORNIA DISTRICT
COUNCIL OF THE ASSEMBLIES OF
GOD, INC., a corporation, and THE
SALVATION ARMY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF

THE STATEMENT OF THE CASE

Appellants trust that their endeavor to achieve brevity in their opening brief did not deprive this court of an adequate statement of the case. It was our belief that the reference to the taking of the property and the proceedings in condemnation prosecuted by the United States sufficiently indicated the nature of the issues and the jurisdiction of the Federal Courts.

Approximately one-half of Appellee's Brief (pages 3 to 73), denominated "Statement", adds an abbreviated history of the course of the trial itself and reflects great diligence on the part of the authors in persual of the 7500 pages of Reporter's Transcript. Fortunately for the readers of this brief, no attempt is made to include the figures and mathematical calculations which embellish the testimony of the 16 witnesses included. As an example of the authors' skill in condensation we refer only to the partial testimony of the government's witness, John E. Hallock, which occupies 334 pages of the printed Transcript of Record (P. 67-~~3~~1005); in full, 433 pages of Reporter's Transcript (p. 1054-1487). Appellee's Statement reduces all this to 3 pages (Brief p. 18-20). The testimony of the other witnesses was not as fully included in the printed transcript but it is fair to say that Appellee's excellent summary of the trial reduces the volume of what the jury had to endure by at least 90 per cent, this entirely apart from the figures incorporated in the 500 exhibits admitted in evidence, only a small portion of which are reproduced in the Transcript of Record, Vol. VI.

Appellee airily waives aside the effect of what it terms "this vast tautology". (Brief p. 88):

"The jury had seen the property. It heard detailed description of its condition. It had heard the preparation, the factors, the reasons, the highest and best uses, and the fair market values repeated 14 times with variations so that even a juror hearing by pure rote should have almost been qualified to take the stand and testify as an expert himself." (Brief p. 84-85)

"With variations" is right! Nowhere did the experts use the same figures and no two of them agreed on the same valuations. Moreover, it must have become apparent from the objections of counsel and the rulings of the court made in the presence of the jury and commented upon by the trial judge that the learned counsel in the case had come to no common belief as to either the facts or the law of the case. If a jury is to learn by rote, its teachers (witnesses, counsel and judge) should at least be in agreement amongst themselves.

RULINGS ON ADMISSIONS OF EVIDENCE

Appellants shall not undertake detailed rebuttal of Appellee's argument on points of law as applied to the instances of admission and exclusion of specific evidence which were presented in Division II of the opening brief (A to G).

The last 30 pages of the government's reply brief furnish much sound argument and an imposing array of authorities which do little more than support Appellant's opening admission (p. 57) that trial courts have

considerable latitude of discretion in this field. There is no dearth of decisions which decline to reverse a trial court's judgment because of its admission or exclusion of a particular line of evidence.

The instances cited by Appellees generally arise out of rulings considered offensive by the land owner and endorsed by the condemning authority. The principle works both ways, however, and we are unable to find where there has been reversal of a trial court on complaint of the condemnor simply because it has exercised its discretion in a particular instance in a manner different from that which the reviewing court might choose to employ. In other words, had the trial court, here, ruled in favor of the Appellants in any one or two of the seven separate instances cited, (A-G), a claim of reversible error by the government would probably be rejected by this court on its appeal, by reason of constituting a separate ruling within the field of discretion available to a trial judge. Thus, to apply Appellee's excellent argument under Section II, any single ruling of the trial court would be supported and reversal would not follow by reason of any single ruling. Reversal would have to be based on the cumulative effect of the rulings in the light of the overall state of the evidence.

The case at bar differs from the ordinary condemnation case dealt with in the court decisions cited on both sides, in this - - there were here available no clearly comparable transactions. This was by reason of the specialized improvements on a huge property lying near the heart of a great city. The expert witnesses disclosed their searches for comparable transactions as far away as Los Angeles and amongst

relatively small and remote properties in San Diego. About the only like sale was the one to appellant Carlstrom in 1947, which was comparatively ancient and unquestionably in the nature of a distress sale by the government. The trial court's decision, reported 164 Fed. Supp. 451 at page 457 says:

"Following the conclusion of the War, there was public clamour for disposition of alleged surplus property. The government had difficulty finding a buyer and finally on May 4, 1948, this portion of the original Plancor was sold to Charles W. Carlstrom for \$1,050,000. This is the portion of the Plancor later condemned by the government and involved in this proceeding."

About the only like leases were the ones by Carlstrom to Convair which the court considered to be "privileged" and kept from the jury. Both Appellants' authorities and those cited by Appellees, recognize and generally declare that the best evidence of fair market value consists of comparative transactions. Question seldom arises on that score since in most condemnation actions at least a few recent transactions involving like property in the vicinity may be found.

Where no satisfactory comparatives are produced, resort may be had to theoretical or calculated values which involve capitalization of income, cost of reproduction, amount of depreciation, necessity of repairs, etc. Questions frequently arise concerning the use of these secondary approaches to ascertainment of fair market value but they are not considered to be determinative factors where true comparatives are available. In such cases the theoretical or calculated

values are important only by way of checking upon and testing of the primary approach - actual transactions.

In their opening brief Appellants conceded that the trial court has wide discretion in the admission of evidence in both fields. The government merely confirms this by its citation of authority. In most of the cases the evidence also shows real strength in the primary field. Where such evidence is unavailable or is unsatisfactory, resort must perforce be had to the secondary fields but the authorities do not endorse reliance alone upon one or more of the theoretical or calculated approaches. They require consideration of all customary approaches. Thus, in reading the cases where the Appellate Courts decline to interfere with a ruling of the trial court, we find, time after time, the explanation of the reviewing court that the jury also had before it other standards for determining value. These, of course, could be in the primary field or in the secondary field or in both.

In our case it appears throughout the record that evidence in the primary field was woefully weak on both sides. For that reason the jury should have been given both sides of all the other factors in the secondary field - neither one side of all of the factors nor both sides of some of the factors. The fact on this appeal is that out of the seven points of difference between Appellants and the United States (quite apart from the double barrelled trial) all seven points were resolved in favor of the United States. It is Appellants' contention that discretion uniformly exercised in favor of one side or the other would become abuse of discretion under the overall circumstances of this case. This is true even though in each instance, standing alone, a

reviewing court would be unwilling to veto the exercise of discretion in the court below.

Consider the plight of the defendants who were faced with the burden of establishing and maintaining the items of market value of every parcel taken by the United States. They, as well as the United States upon rebuttal, were unable to produce instances of recent comparative sales, and little more than the excluded Convair leases. The primary field was closed to both sides so both sides were compelled to resort to the secondary field. While the owners were afforded some latitude by the court in other instances, the ruling in the seven complained of kept from the jury certain factors which might have been favorably decided for Appellants; other factors were allowed to go to the jury under implications which were unfavorable to Appellants.

The rule of discretion is not absolute. In a case where comparables do not exist, neither a trial court nor an Appellate Court would be justified in barring all or a significant part of secondary evidence offered by either side. Proof of market value might thus be made impossible for one side or the other or, conceivably, for both sides. The practicable and fair course would seem to be to allow the jury to hear all secondary testimony and resolve it according to their own discretion. They should not be foreclosed by objections from either side supported by court rulings.

In the present case there were no down to earth comparative transactions. The expert witnesses were permitted to explore the outer space and came up with speculative figures, some as low as \$2,000,000 aggregate - some as high as \$10,000,000. (See Appellants'

Appendix I to III for breakdown). By the rulings complained of the jury was denied direct access to most of the figures in the secondary field but, over Appellants' objection, it was permitted in instance E to consider the original bargain price paid by Carlstrom and in instance A the cost of rehabilitation figured by Hallock.

Taken alone any one or two of the discretionary rulings complained of would hardly encourage an Appellate Court to send back for settlement or retrial such a long and complicated case as this. Had there been some average of the rulings - some in favor of the owners and some in favor of the government - there would be a disposition to let them lie. But here we have seven instances out of seven where discretion accumulated against the owners alone.

THE CONVAIR LEASES (D)

Some clarification would seem to be in order concerning application of the Cors case by the lower court and the government's reliance upon it here. The soundness of the principle announced by the Supreme Court is unquestionable (U.S. vs. Cors, 337 U.S. 325). Enhancement of value resulting from the government's special or extraordinary requirements for the property is not ground for increased compensation to the owner. It must be borne in mind that the Steam Tug there involved was taken directly by an instrumentality of the United States, War Shipping Administration. The United States took the vessel because it needed it, so the transaction fell within a closed circle.

This corresponded to the taking of the use rights

by the United States in our case at the time the first condemnation action was filed in 1953. Naturally, a jump in value could not be thus created. But at the earlier date, when Convair entered into leases with Carlstrom, there was no participation by the United States. It was an open market transaction between a private owner and Convair, a private profit corporation. The mere fact that the United States was in the market for certain finished products which Convair proposed to manufacture according to government specifications placed the government under no necessity. It was free to contract for the same articles with any other competent manufacturer in any other city.

The United States did not agree to pay Carlstrom any rent. It is glibly said that the government paid Convair's rent. So it might be said that Carlstrom pays his attorneys' office-rent! It is conceded that Convair used the same premises to produce goods for other customers, something like 15% of its output. Suppose it had been 51% or 49%. Just where would Convair become or cease to be an instrumentality of the United States? Just when would Convair acquire the right of eminent domain? It is worthy of note that Supreme Court justices Frankfurter, Jackson and Burton in the Cors case dissented from the majority opinion even where the alleged enhancement was created by a 100% instrumentality of the United States.

It is contended that the trial court in our case did not actually exclude the Convair leases; it admitted them after erasing all figures which might have given the jury concrete rental values of identical parcels within 2 years of the actual taking of the use rights by

the United States! These rental figures would have given also sound basis for computing the capital value of the respective fee estates. Production of the rental figures for the jury was the important reason for the owners' offer of the leases in evidence. Of like importance was the offer of proof of fair market rental values between June 1954 and July 1955. The implication is that this proof would have been independent of the Convair leases. (G. Opening brief p. 54-57).

The direct significance of rejection of the Convair lease prices and the rejection of certain Appellants' offer of proof, attaches primarily to the earlier stage of the trial when the useage values were being presented to the jury. In our opening brief we mentioned the bearing of these leases on the later consideration of fee values of the same property. This connection between the two phases of the condemnation is emphasized by a recent decision of this Ninth Circuit Court which is alluded to in Appellee's brief (p. 89). This case is Phillips v. United States, 243 Fed. 2d 1.

It involved numerous preliminary takings of useage terms with final taking of the fee. Separate condemnation actions were filed by the United States but all were combined for trial, apparently by consent of all parties. This court reversed the judgment based on separate verdicts of the jury on account of error of the court in excluding the effect of mineral potentials of the realty reflected in the leases. It was held that the error related to the fee valuation as well as to the use valuation so that the reversal must attach to the aggregate verdicts and to the whole judgment.

Reverting to the Convair leases, the government's

position on the unity of the United States of America with the Convair corporation may be reduced to absurdity by following through the customary performance of airplane construction and delivery. For example, Convair contracts with the government to construct so many airplanes to such and such specifications. For each it is to receive a price which may be a flat, overall price per unit or at cost plus a percentage, etc. Progress construction and final assembly are subject to government inspection and approval. Only specified parts and specified sub-contractors may be employed. Lockheed furnishes certain parts, Ryan furnishes some, Rohr furnishes some. Final assembly and delivery is by Convair.

Part of the "rent" paid by the United States is thus kept by Convair, part goes to Lockheed, part to Ryan, part to Rohr. The plane component furnished by each of the latter is subject to rejection and return if it does not pass government inspection. Doubtless the bulk of the business of the two smaller corporations falls in this category during periods of defense preparation. Are we to conclude that Lockheed, Ryan and Rohr, as well as Convair, are instrumentalities of the United States?

CARLSTROM'S PURCHASE PRICE (E)

The government enumerates with natural satisfaction many instances where Appellate Courts have held it to be within the discretion of the trial court to admit actual prices paid for identical properties within 3, 4, 5, 6, 7 years of government taking. Although the conveyance of the land and improvements to Carlstrom by

the United States was dated in 1948, the bargain was made and the price fixed in 1947. Thus the discretion of the trial court below was apparently stretched beyond periods generally found acceptable.

The Appellate Court in another of the cases cited by Appellee declared:

"Recent sales of the very property condemned are entitled to considerable weight, but sales of similar property are entitled due weight also. Similar sales closer in time to the date of taking would reflect more accurately the condition of the market at the time of taking." (Hickey v. U.S. 208 Fed. 2d 269, 273) (Underscoring added)

We must not lose sight of the requirement placed on all transactions involving either identical or similar properties to the effect that the previous sale must be "reasonably recent and not forced." (Simmonds v. U.S., 199 Fed. 2d 305, 307)

LATITUDE OF SECONDARY APPROACHES

Appellants do not for a moment contend that cost plus depreciation establishes market value. No more does the estimate of an expert appraiser. True market value is rightly the reflection of current transactions in an open market. College professors and stock brokers may expound on the merits or demerits of a particular issue, but we turn to our daily newspapers for the market value of a particular stock share on a given day. Should the stock exchanges cease to operate

for a year or even for a month, the investing public would be relegated to the same sort of secondary inquiries as were or were not given to the jury in this case.

Appellee in its attempt to condemn the owners' efforts in this direction, aptly summarizes the views of our Appellate Courts which it cites at great length.

"In practically all the cases where introduction of this type of evidence has been upheld, the circuit courts have been careful to point out either the uniqueness of the property or the absence of any comparable sales or other type evidence on which to base an award." (Brief p. 104.) (Underscoring added)

A few pages further on they quote from the court's instruction, insisted on by the United States, that the Convair lease figures are not to be considered because of:

"*** the necessity of the government acting through Convair, the contractor *** for facilities for the particular kind as are involved in this case in the particular area ***" (Brief, page 107.) (Underscoring added)

Nowhere in the brief does Appellant refer this court to a single quotation of testimony or documentary evidence of a single "comparable sale". The only "other type of evidence" consists of the utterly irreconcilable expert opinion valuations and the particular secondary approaches which were favored by the government and approved by the trial court. It was this

surprising situation which lead Appellants to make the "surprising" suggestion that the entire field of secondary considerations of value should be opened to consideration by the jury.

Appellants do not relish such a prospect but again we must remark that the whole vast tautology was invoked by the government and not by the owners nor the lessors. Appellee's attorneys were the architects of combination trial and its administrative officers devised and directed the piecemeal takings of the property. We cannot refrain from quoting the pithy summary of a like situation voiced by a venerable justice of this court a short time ago:

"If we attempt to cut a condemnation proceeding into slices, it bleeds."
(Phillips v. U.S., 243 Fed. 2d 1. Mar. 22 1957)

CONFUSION STILL PERSISTS

Coupled with these cumulative rulings and aggravated by them was the abuse of discretion in denying appellants' motion for separate trial of issues arising from the first leasehold taking and the subsequent fee taking.

Appellants appreciate the concern of counsel for the United States over the plight which would have confronted the owners if the trial court had granted their motions for separation of issues. It is, however, the actual plight of the jury which concerns us now. It cannot be denied that the time of trial was greatly increased by combination of the two issues - say by one

third, the number of exhibits by one-half, the columns of figures doubled. The complexities of the case engendered by the second taking and unification of trial of issues are not to be shrugged off.

As the Fifth Circuit Court decision pointedly observed in the Gwathmey decision, it is the United States which chooses the manner of takings and imposes the multiplicity. The least that should be accorded the owner is the right to divide the trial according to the sequence elected by the sovereign, particularly where the two takings are separated by two years time, not two months as in the Gwathmey case.

No one has the slightest suspicion of any willful disregard of evidence in connection with Tract 106. Appellants harbor only a feeling of understanding and sympathy for this jury. "Blue Ribbon" or not, in its verdict on this item, it manifested beyond any doubt a state of utter confusion in selection of valuations. Appellee seeks to brush off the significance of this by characterizing a mistake of \$20,000 as "insignificant". Perhaps it is, in the book of a rich nation which can give away billions to strangers across the seas. But to an American citizen and three charitable corporations it has real significance. In itself it seemed worthy of a motion for new trial by the United States of America. In its implications it is worthy of a reversal by this court of the aggregate verdict of which it formed a part. In how many of the other twenty separate verdicts rendered by the jury were there insignificant mistakes of \$20,000 or more each, and how many of these operated to the prejudice of appellants instead of to the prejudice of the United States?

Appellee seeks also to dispose of the Gwathmey decision by belittling the similarity to our case. The test does not lie in the number of parcels or parties alone. It lies in the opportunities for confusion and the signs of it in the particular record. A thousand parcels of unimproved adjoining lands might require only the application of an average price per acre. Seventy acres of metropolitan property, improved and involving a two-year spread of time with partial and conditional takings, might well multiply the difficulties 70 times. The periods of time required for trial and the volumes of the transcript and exhibits furnish a pretty fair index of the comparative complexities and difficulties before the respective juries.

In the Gwathmey case (quoted p. 27 of appellants' opening brief) the Circuit Court of Appeals did not hesitate to surmise that "the task of the jury was so overwhelming they must have used whatever method of computation or approximation of values seemed reasonable to all twelve". So it must have been in our case. In addition, as the United States pointedly surmises (Reply Brief p. 8) in recesses during the trial, members of the jury undoubtedly made private inspections of the premises. Such conduct, of course, was improper and has often been held to constitute sufficient ground for vacating a verdict.

It is not likely that anyone connected with this case believes that the jurors intelligently arrived at a definite valuation for each of the several parcels and tracts and gave an independent verdict thereon. Human nature being such as it is and the human mind having limitations of memory and power of analysis, our jury must have used whatever method of computation or

approximation of values seemed reasonable to all eleven.

Appellee properly points out that not all of the court hours devoted to this trial were spent in the presence of the jury. Adopting its deletions (Reply brief p. 73) it fairly appears that the jury enjoyed recesses corresponding to 2000 pages of transcribed reporter's notes. During much of that time, however, the members were held in attendance in the corridors awaiting call. This cumulative recess was doubtless made up by the 15 days of deliberation which period is not measurable by the length of the reporter's transcript.

Whatever the wear and confusion generating listening time may have been, the 500 documentary exhibits in the case graphically reflect the stockpiling of varying and contradictory figures which the jury was called upon to unravel in the end.

We respectfully invite any and all members of this court of Appeals to review and analyze all the figures appearing in Volume VI of the printed Transcript alone and emerge with anything better than blurred vision and mental uncertainty!

CONCLUSION

This is a lawsuit about money but, as pointed out in the opening brief, it centers around principles which the courts have been diligent to defend since Magna Carta days. Appellants in their opening brief (p. 23-30) quoted extensively from the decision in the

Gwathmey case because of the logical philosophies voiced there. Counsel for the United States dare not question this courageous bulwark presented for the protection of the citizen property owner against the exigencies or fancied exigencies of his own sovereign.

In the court below and now in this court they seek to escape these principles by the bland announcement that there were no such difficulties presented in our own case as were apparent in the Gwathmey case. Beyond any question that is what the learned judge of the court below believed at the beginning of our trial. To his trained mind the prospect did not seem to^o alarming nor the burden of the jury too difficult. He, and we must say the attorneys on both sides, made every endeavor to pilot the jury through the morass in which they shortly found themselves.

The government attorneys conclude (reply brief p. 85) that in one instance only did the jury go astray and that only for a distance of 20,000 dollars, which, after all, is nothing in terms of mere money. It is infinitely more as a badge of confusion and frustration. As the reply brief points out with pride, the jury had a roomfull of figures, schedules and calculations from seven different sources, no two alike. It took 15 days milling around amongst these and others of their own proposing. Small wonder that in desperation they adopted the 36 figures for the 5 sets of equations handed to them for solution. Evidently not one of them, even upon the polling of the jury, noticed the inexcusable error regarding Tract A-106.

There was far more disparity in the figures, schedules and calculations furnished to them for the

other tracts; hundreds of thousands of dollars in some instances. What did the jury members actually believe and have in mind when they agreed on these other 35 valuations required of them?

The executive officers of the United States initiated this "vast Tautology" of confusion (credit to Appellee's counsel - reply brief page 88). It took them over 2 years to make up their minds whether they wanted full title to the property or only partial title. They took it piecemeal - first the minimum term occupancy, then the optional extended term occupancy - finally fee title. The department of justice rejected the owners' plea for simplification of any sort. Let the result be on their heads!

It is, of course, a matter of grave moment to the Appellants whether or not they are to have an opportunity to submit their single case on the fee values upon a retrial. In all likelihood the useage values remaining may be disposed of by settlement. It might be, even, that the United States and the owners, with the expert valuations before them and with such clarification as the Court of Appeals may give on the questions of admissibility of evidence, would be able to arrive at agreed compensation for the fee takings. If not, they might be willing to submit the testimony on separated issues to a district judge sitting without a jury.

Aside from our admitted interest in an increase of award, particularly for the fee titles, we submit that the proceedings of the United States in its piecemeal taking and in depriving the owners of their constitutional right to separate trial of issues, should not receive the blessing of our higher courts which would be implicit

in an affirmance of the judgment of the District Court.

It would seem that the administrative officers of the United States as well as its legal advisors should have heeded the admonitions of the Court of Appeals in the Gwathmey case (Opening brief p. 28, 29, 30). Had the government determined on a clear concise fee acquisition in the first place, or had it proceeded diligently with condemnation of the useage rights instead of waiting over two years before changing its mind and seeking to tack on a fee condemnation (opening brief p. 2) the complications complained of (opening brief Section One. p. 16) would never have arisen.

Appellants had and have no objection to inclusion of several parcels or tracts in either condemnation proceeding. In fact, as Appellee points out, they desired this as a basis for seeking unification valuation of their properties. True, the inclusion of additional parcels, particularly where improvements exist, does require additional time for trial and does cumber the record with more figures, but such an election by the sovereign does not necessarily infringe upon "the individual landowners constitutional rights to due process and just compensation". Somewhere a line must be drawn, however. The Fifth Circuit Court of Appeals has said less than 25 days between takings and amendment of pleadings; less than 8 weeks in resulting trial time. We suspect that the trial court itself in the Gwathmey case would not have countenanced such extension of limitations as exists in our case: 30 times as long between takings; almost 3 times as much trial time. (Gwathmey 8 weeks - Carlstrom 23 weeks).

We do not attribute to the administrative branch of

our government any sinister motives in refraining from a single taking of the fee in this case. Neither do we criticize the Department of Justice for its resistance to Appellants' efforts to simplify the trial. Its attorney, Mr. McPherson discharged his duty when he stated to the court his agreement that consolidation would be of benefit to the government. Least of all do we intimate any degree of intentional favoritism on the part of the trial judge in requiring a single trial and a single set of verdicts. We do feel that he underestimated the resulting burden on the jury and overestimated his own ability to keep its members and the respective attorneys in the case in the straight and narrow path.

Again we quote from decision of this court speaking through Justices Stephens, Orr and Lemon:

"Never niggardly in its standards for the compensation of the expropriated landowner, the Supreme Court has grown progressively more liberal in its cannons for the reimbursement of those who are dispossessed through the right of eminent domain."
(Phillips v. U.S. 253 Fed. 2d 1. 1957)

Inasmuch as this honorable court is in no position to alter the respective verdicts or weigh the evidence - either that which was admitted or that which was rejected - it would appear that the reversal prayed for is the appropriate and only effective means of applying liberality in the canons for reimbursement which it has already approved.

Respectfully submitted,

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